TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 45

THE UNITED STATES, PETITIONER

vs.

THE KANSAS FLOUR MILLS CORPORATION

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MARCH 31, 1941
CERTIORARI GRANTED MAY 12, 1941

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 909

THE UNITED STATES, PETITIONER

vs.

THE KANSAS FLOUR MILLS CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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1 In the Court of Claims

No. 43919

THE KANSAS FLOUR MILLS CORPORATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

I. *Petition*

Filed April 20, 1938

To the Honorable, the Chief Justice and the Judges of the Court of Claims:

I

The plaintiff is, and at all times hereinafter mentioned was, a corporation duly organized and existing under the laws of the State of Delaware, with its principal offices and place of business at 1000 New York Life Building, Kansas City, Missouri, and engaged in the business of manufacturing flour and related products for sale to various buyers, including the United States of America.

II

2 The plaintiff, from time to time, in accordance with the general practice of public bidding, followed by the various Departments of the United States Government, including, among others, the Veterans' Administration, the Department of Agriculture, and the Department of Justice, has submitted bids and obtained awards, which have constituted contracts for the purchase and acceptance of flour and bran by the United States for delivery by the plaintiff corporation at designated periods and stated points of delivery. The plaintiff has at all times complied with the requirements contained in said contracts, and as a result there has been certification to the applicable disbursing officer of the United States for payment to the plaintiff of the indebtedness incurred thereunder.

III

The plaintiff, on or about May 12, 1936, obtained the award on Contract VAS-2150 for the sale of 2,400 barrels of hard wheat flour, to be shipped to Manager, Veterans' Administration, Supply Depot, 1749 West Pershing Road, Chicago, Illinois, on Gov-

ernment bill of lading @ $3.93 per barrel, or an aggregate price of $9,432.00, and for the sale of 1,800 barrels of hard wheat flour to be shipped to Manager, Veterans' Administration, Supply Depot, Perryville, Maryland, on Government bill of lading, @ $3.93 per barrel, or an aggregate price of $7,074.00. Said wheat flour was shipped, in accordance with instructions received from the Veterans' Administration, and pla'ntiff's invoices bearing Nos. 3674, 3677, 3728, 3729, 3730, 3731, covering the shipment to Chicago, Illinois, and plaintiff invoices bearing Nos. 3671, 3676, 3708, 3716, 3717, 3718, covering the shipment to Perryville, Maryland, were sent to the Veterans' Administration at the time of shipment. Bureau vouchers covering the total sum of
3 $16,431.41 were approved by the Veterans' Administration for payment and submitted to the General Accounting Office of the United States for preaudit, in accordance with existing administrative procedure. Payment of said sum of $16,431.41 represented by said vouchers has never been made, but on the contrary has been withheld and is still withheld by the United States through the General Accounting Office.

Notice of Settlement of Claim of the General Accounting Office, Certificate No. 0437876, Claim No. 0577319 (1) issued March 9, 1937, certified that $16,431.41 was due the plaintiff, but that said sum was credited as an offset against a pretended indebtedness the plaintiff has never admitted, but on the contrary expressly denies.

IV

The plaintiff, on or about July 31, 1936, obtained the award for the sale of twenty tons of wheat bran, Purchase Order No. 80, at $24.50 per ton, F. O. B. Kansas City, Missouri, or a total price of $490.00, and the award for the sale of 250 tons of wheat bran, Purchase Order No. 32, at $21.25 per ton, F. O. B. Kansas City, Missouri, or a total price of $5,312.50, from the United States Department of Agriculture, Bureau of Entomology and Plant Quarantine. Said wheat bran was shipped in accordance with instructions from the Bureau at stated intervals until the total amount covered by the orders was delivered. Plaintiff's invoice bearing No. 842 covering Purchase Order 80, and plaintiff's invoices bearing Nos. 568, 582, 610, 622, 623, 631, 651, 652, 653, 654, 655, and 656, covering Purchase Order 32, respectively, were sent at time of shipment, covering each shipment to the United States Department of Agriculture, 230 East 9th Street, Kansas
4 City, Missouri. Bureau Schedule No. 74, dated July 31, 1936, Voucher No. 249, and Bureau Schedule No. 166,

dated August 17, 1936, and Voucher No. 608 were issued and forwarded to the General Accounting Office for preaudit before payment. Payment of the sum of $5,802.50 represented by these vouchers has never been made, but on the contrary has been withheld by the United States through the General Accounting Office.

Notice of Settlement of Claim of the General Accounting Office, Certificate No. 0440022, Claim No. 0577319 (2) issued March 30, 1937, certified that $5,802.50 was due the plaintiff, but that said sum was credited as an offset against a pretended indebtedness the plaintiff has never admitted, but on the contrary expressly denies.

V

The plaintiff, on or about Dec. 4, 1936, obtained the award on its proposal of November 5, 1936, Contract No. JIc-4705, Item 1, for the sale of 210 barrels of wheat flour, in accordance with specifications No. 9, dated May 15, 1928, branded as Gilt Edge Hard Wheat Flour, to be shipped to United States Northeastern Penitentiary, Lewisburg, Pennsylvania, @ $5.02 per barrel, making an aggregate price of $1,054.20. Said wheat flour was shipped in accordance with instructions from the Department of Justice, Penal and Correctional Institutions, on Government bill of lading J-56720, on or about February 1, 1937. Plaintiff's invoice bearing No. 2976 was sent at the time of shipment to U. S. Northeastern Penitentiary, Lewisburg, Pennsylvania. Bureau Schedule No. 528, dated February 19, 1937, Voucher No. 2272 was issued and forwarded to the General Accounting Office for preaudit before payment. Payment of the sum of
5 $1,054.20, represented by this voucher, has never been made, but on the contrary has been withheld and is still withheld by the United States through the General Accounting Office.

Notice of Settlement of Claim of the General Accounting Office, Certificate No. 0444185, Claim No. 0577319 (6) issued May 4, 1937, certified that $1,054.20 was due the plaintiff, but that said sum was credited as an offset against a pretended indebtedness the plaintiff has never admitted, but on the contrary expressly denies.

VI

The total amount of indebtedness owed the plaintiff by the United States on account of products sold, delivered to and accepted by the United States, as shown by the aforesaid allegation of facts is $23,288.11.

No department, bureau, office, or officer of the United States, to the best of the plaintiff's knowledge, information, and belief,

VII

has ever denied that the plaintiff is entitled to $23,288.11 on account of the above alleged indebtedness. On the contrary, the bureau, department, office, or officer charged with the responsibility concerning said items has approved payment to the plaintiff, as heretofore alleged, but said amounts have been withheld from the plaintiff by the United States through the Comptroller General of the United States, who has assumed to credit the said amounts on a pretended indebtedness the plaintiff has never admitted, but on the contrary expressly denies, and which credits the plaintiff has never accepted as payment of the said amounts due it from the United States or any of them, or any part
6 thereof, so that by reason of these premises there is due the plaintiff on account of the foregoing items a total sum of $23,288.11 with interest on the three amounts shown in paragraphs III, IV, and V from the date said amounts were withheld by said Comptroller General of the United States, all of which is now wrongfully withheld from the plaintiff without its consent and against its will by the United States, as aforesaid, and recovery of which is sought by plaintiff in this action.

VIII

Your plaintiff is not afforded an appeal to any other department of the Executive Branch of the Government from the action of the Comptroller of the United States respecting this claim. No action upon this claim, other than that herein stated, has been taken before Congress or any of the departments of the United States, or in any court other than the petition filed in this Court.

IX

Your plaintiff has at all times, through its officers and agents, borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government. Your plaintiff is the sole and absolute owner of the claim herewith presented, and has made no transfer or assignment of said claim or any part thereof, and is justly entitled to the amount claimed herein from the United States after allowing all just credits and set-offs.

X

Your plaintiff believes the facts as herein stated are true.
7 Wherefore, your plaintiff prays judgment in its favor against the United States of America in the sum of

$23,288.11 for monies wrongfully withheld from it, and for interest at 6% per annum, respectively, on $16,437.41 from March 9, 1937, on $5,802.50 from March 30, 1937, and on $1,054.20 from May 4, 1937, to date of payment, and for such other and further relief as in the premises to this Court may seem meet and proper.

PHIL D. MORELOCK,
630 Shoreham Building, Washington, D. C.,
Attorney for Plaintiff.

Of Counsel:
MORELOCK & LAMB,
Washington, D. C.;
CECIL H. HAAS,
Kansas City, Missouri.

[*Duly sworn to by Phil D. Morelock; jurat omitted in printing.*]

8 II. *General traverse*

Filed May 26, 1938

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

SAMUEL E. WHITAKER,
Assistant Attorney General.

III. *Submission of case without argument*

On October 11, 1940, the case was submitted on merits without argument by Phil D. Morelock for plaintiff, and by Guy Patten for defendant.

9 IV. *Special findings of fact, conclusion of law and Per Curiam opinion*

Filed January 6, 1941

Mr. Phil D. Morelock for the plaintiff.

Mr. Assistant Attorney General Samuel O. Clark, Jr., for the defendant. Messrs. Robert N. Anderson, Fred K. Dyar, and Guy Patten were on the brief.

This case having been heard by the Court of Claims, the court, upon stipulation of the facts and the evidence adduced, makes the following

Special findings of fact

1. Plaintiff is a corporation organized and existing under the laws of the State of Delaware, with its principal office in Kansas

City, Missouri, and at all times mentioned herein was engaged in the business of manufacturing flour and related products from wheat for sale to various buyers, including the United States.

2. On May 12, 1936, plaintiff entered into a contract (No. VAS–2150) with the United States Veterans Administration by the terms of which it agreed to sell to the United States 4200 barrels of hard wheat flour at $3.93 per barrel, or a total price of $16,506.00. Said supplies were furnished and delivered by the plaintiff to the defendant, accepted and approved by the defendant except for an adjustment of $74.59 on account of the failure to deliver 3,720 pounds of flour, leaving an agreed total price of $16,431.41. Proper Bureau Vouchers (Nos. 117 and 9312) were issued and forwarded to the General Accounting Office for pre-audit before payment. Payment of the total sum of $16,431.41 was withheld by the Comptroller General, who, on March 9, 1937, issued his Notice of Settlement of Claim of the General Accounting Office (Certificate No. 0437876, Claim No. 0577319 (1)) in which he certified that the sum of $16,431.41 was due the plaintiff under such contract but had been credited by him against an alleged indebtedness of a larger amount on account of an alleged overpayment made by defendant to plaintiff under certain other contracts referred to in Findings 3 and 5 hereof.

On June 27, 1936, plaintiff obtained the award for the sale of 250 tons of wheat bran, Purchase Order No. 32, at $21.25 per ton, F. O. B. Kansas City, Missouri, or a total price of $5,312.50, and, on July 31, 1936, the award for the sale of 20 tons of wheat bran, Purchase Order No. 80, at $24.50 per ton, F. O. B. Kansas City, Missouri, or a total price of $490.00, from the United States Department of Agriculture, Bureau of Entomology and Plant Quarantine. Said supplies were furnished and delivered by the plaintiff to the defendant, accepted and approved by defendant, and proper Bureau Vouchers (No. 249 and No. 608) were issued and forwarded to the General Accounting Office for pre-audit before payment. Payment of the sum of $5,802.50 was withheld by the Comptroller General, who, on March 30, 1937, issued his Notice of Settlement of Claim of the General Accounting Office (Certificate No. 0440022, Claim No. 577319 (2)) in which he certified that the sum of $5,802.50 was due to the plaintiff under said contract but had been credited by him against an alleged indebtedness of a larger amount on account of alleged over-payments made by defendant to plaintiff under certain other contracts referred to in Findings 3 and 5 hereof.

On December 4, 1936, plaintiff entered into a contract (No. JLc–4705) with the Department of Justice for the sale of 210 barrels of hard wheat flour for delivery to the United States Northeastern Penitentiary, Lewisburg, Pennsylvania, at $5.02 per

barrel, or a total price of $1,054.20. Said supplies were fur-
11 nished and delivered by the plaintiff to the defendant, accepted and approved by defendant, and proper Bureau Voucher (No. 2272) in the amount of $1,054.20, was issued and forwarded to the General Accounting Office for pre-audit before payment. Payment of the sum of $1,054.20 was withheld by the Comptroller General, who, on May 4, 1937, issued his Notice of Settlement of Claim of the General Accounting Office (Certificate No. 0444185, Claim No. 0577319 (6)) in which he certified that the sum of $1,054.20 was due the plaintiff under such contract but had been credited by him against an alleged indebtedness of a larger amount on account of an alleged overpayment made by defendant to plaintiff under certain other contracts referred to in Findings 3 and 5 hereof.

3. During the period from May 1935 to January 6, 1936, plaintiff entered into a number of contracts with the United States, by the terms of which it agreed to sell to the United States and the United States agreed to buy a total of 3,383,000 pounds of flour. There follows an excerpt from one of the aforementioned contracts between the plaintiff and the defendant which is typical of the price provision contained in all of the aforementioned contracts and that contained in all of the invoices issued to the defendant by the plaintiff covering the contracts:

Item	Pounds (about)	Unit price (per pound)	Total contract price
Lb. Flour, wheat, in sacks, Type A	78,400	0.0323	$2,532.32

Each contract also contained the following clause:

"Prices set forth herein include any Federal tax heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, processing tax, adjustment charge or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract, and are paid to the Government by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly, and any amount due the contractor as a result of such
12 change will be charged to the Government and entered on vouchers (or invoices) as separate items."

Plaintiff made delivery of all flour provided for in the contracts, same was accepted by defendant, and the defendant paid to plaintiff the bid or contract price therefor.

Plaintiff was the processor of the wheat from which the flour was manufactured, and, along with other first domestic processors, during the period from May 1935 to January 6, 1936, applied to and obtained from the United States District Court for the District of Kansas an injunction against the Collector of Internal Revenue prohibiting the collection from it of any processing taxes so that no processing taxes were paid by the plaintiff on the processing of wheat used in the manufacture of the flour delivered to the defendant.

4. Prior to the execution of the contracts mentioned in Finding 3 hereof, the Secretary of Agriculture, in accordance with the authority vested in him by the provisions of the Agricultural Adjustment Act of May 12, 1933 (48 Stat. 31), as amended, had, by Wheat Regulations approved by the President, established the rate of processing tax imposed on the first domestic processing of wheat and the conversion factor necessary to determine the processing tax imposed upon a particular product manufactured from wheat. Under such regulations the tax was fixed at 30 cents per bushel on all wheat processed, and the conversion factor applicable to floor stocks of flour was fixed at .00704 cents per pound.

5. The identification of the contracts referred to in Finding 3 hereof and the defendant's computation of the amount of the processing taxes which the defendant alleges were included in the contract price of the flour delivered to the defendant by the plaintiff at the rate of .00704 cents per pound of flour follows:

Contract No.	Amount of process tax
W-199-qm-12560	$5,849.14
W-199-qm-12709	4,695.61
W-199-qm-13049	1,425.38
VAs-41878	11,386.37
W-199-qm-12803	686.25
VAs-1592	3,298.10
VAs-1678	275.97
W-199-qm-12270	802.38
Total	$28,419.20

13 As heretofore shown, there was certified due the plaintiff in Settlement No. 0437876 the sum of $16,431.41, and $1,425.38 thereof was credited to the plaintiff's alleged indebtedness of $1,425.38 under contract No. W-199-qm-13049; $10,629.80 was credited to plaintiff's alleged indebtedness under contract No. VAs-41878; $3,298.10 was credited to plaintiff's alleged indebtedness under contract No. VAs-1592; $275.97 was credited to plaintiff's alleged indebtedness under contract No. VAs-1678, and the remainder of $802.16 was credited against plaintiff's alleged indebtedness under contract No. W-199-qm-12270.

As heretofore shown, there was certified due the plaintiff in Settlement No. 0440022 the sum of $5,802.50 and that amount was credited by the Comptroller General to plaintiff's alleged indebtedness under contract No. W–199–qm–12500.

As heretofore shown, there was certified due the plaintiff in Settlement No. 0444185 the sum of $1,054.20 and that amount was credited by the Comptroller General to plaintiff's alleged indebtedness of $756.57 under contract No. VAs–41878 and the remainder of $482.94 applied against plaintiff's alleged indebtedness under contract No. W–199–qm–12893.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is entitled to recover $23,288.11.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of twenty-three thousand two hundred eighty-eight dollars and eleven cents ($23,288.11).

Opinion

PER CURIAM: The plaintiff in this case seeks to recover $23,288.11 for flour sold to the defendant. The price at which the flour was sold is not in dispute and the Comptroller General of the United States has allowed plaintiff's claim in that
14 amount but credited it against an alleged indebtedness of a larger amount on account of what defendant claims to be overpayments made by defendant to plaintiff under eight other contracts. The controversy in the case is whether the defendant had the right to so credit the amount due the plaintiff or deny payment for the flour in any other manner.

The precise question involved in the case was recently decided by this court in the case of Ismert-Hincke Milling Co. v. United States, 90 C. Cls. 27, adversely to the Government, and opinions in a number of cases were cited in support of the decision then made. So far as we are aware the cases are uniform in holding that the contention made by the defendant herein cannot be sustained.

The latest case to which our attention has been called is that of United States v. Hagan & Cushing Co., No. 9459, filed November 30, 1940, in the United States Circuit Court of Appeals for the Ninth Circuit, decided unfavorably to the Government, one Judge dissenting.

It follows that the plaintiff is entitled to judgment for $23,288.11, which will be entered in its favor accordingly. It is so ordered.

15 V. *Judgment of the court*

January 6, 1941

Upon the special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is entitled to recover.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of twenty-three thousand two hundred eighty-eight dollars and eleven cents ($23,288.11).

16 [Clerk's certificate to foregoing transcript omitted in printing.]

[Endorsement on cover:] File No. 45258. Court of Claims. Term No. 909. The United States, Petitioner vs. The Kansas Flour Mills Corporation. Petition for a writ of certiorari and exhibit thereto. Filed March 31, 1941. Term No. 909 O. T. 1940.

Supreme Court of the United States

Order allowing certiorari

Filed May 12, 1941

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. [redacted] 903 45

In the Supreme Court of the United States

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THE UNITED STATES, PETITIONER

v.

THE KANSAS FLOUR MILLS CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Claims was entered January 6, 1941, and is, as yet, unreported.

JURISDICTION

The judgment of the Court of Claims was entered January 6, 1941. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

in the amount of $[illegible] were forwarded to the General Accounting Office.

Payment of the vouchers was withheld by the Comptroller General on the ground that respondent had been overpaid in an amount aggregating $[illegible] on eight earlier contracts covering the sale of flour to the United States. This amount represented the Agricultural Adjustment Act processing taxes on the flour covered by the eight contracts. As a result of an injunction obtained by respondent against the collection from it of any processing taxes, and the decision in *United States* v. *Butler*, 297 U. S. 1, no part of the $[illegible] was ever paid to the United States.

Each of the eight contracts contained the following provision:

> Prices set forth herein include any Federal tax heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, processing tax, adjustment charge or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract, and are paid to the Government by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or

> decreased accordingly, and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items.

On April 20, 1938, respondent filed this suit in the Court of Claims to recover on the four contracts described above, and contested the offsets claimed by the Government arising out of the eight contracts. The Court of Claims entered judgment in favor of the respondent in the amount of $23,288.11, relying primarily upon its earlier decision in *Ismert-Hincke Milling Co* v. *United States*, 90 C. Cls. 27.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the Comptroller General was not entitled to credit, against amounts due on later contracts, amounts paid respondent on earlier contracts in reimbursement for processing taxes, which the contractor never paid.

2. In failing and refusing to hold that the contracts provided for adjustment of the prices therein to compensate for the changes in the applicable federal taxes resulting from the injunction obtained against collection of the taxes and the decision in *United States* v. *Butler*, 297 U. S. 1.

3. In holding that the amounts included in the contract prices to compensate for processing taxes

were buried in such prices and could not be segregated therefrom.

4. In failing to hold that price adjustments were necessary notwithstanding the absence of any express Congressional repeal of the processing taxes imposed by the Agricultural Adjustment Act.

5. In failing to hold that, if Congressional action were necessary, the comprehensive statutory machinery established by Congress in 1936 for refunds of processing taxes constituted such Congressional action.

6. In failing to enter judgment for the United States and dismissing the petition.

REASONS FOR GRANTING THE WRIT

1. The question presented is of general importance. Nearly all Government contracts for the purchase of supplies since 1933 have contained either identical or substantially similar provisions. There are now pending in the Court of Claims and in various other federal courts approximately 15 cases raising the same question. In addition, approximately 25 cases have been transferred by the General Accounting Office to the Department of Justice in which suit has not yet been instituted and the Comptroller General advises that the cases of approximately 170 additional contractors, involving a much larger number of contracts and totaling approximately $2,000,000 in amount, are still pending in his office.

The Government refrained from petitioning for certiorari in *Ismert-Hincke Milling Co.* v. *United States*, 90 C. Cls. 27, hoping that a conflict might develop shortly thereafter. However, nearly eighteen months have passed since that decision,[1] and it is in the public interest that the question be settled without further delay.

2. The lower court's interpretation of the contractual provisions in question conflicts with the views of this Court as to the purpose of those provisions expressed in *United States* v. *Glenn L. Martin Co.*, 308 U. S. 62, and *United States* v. *Cowden Manufacturing Co.*, No. 188, present Term. Both cases involved contractual provisions substantially identical with those in the instant case. The former raised the question whether after-imposed Social Security taxes might be added to the contract price. This Court, in construing the price clause, recognized that, so far as taxes imposed directly on the articles contracted for were concerned, the contract was designed to stabilize the contractor's margin of profit (p. 64), but held that Social Security taxes were not imposed "on" the articles sold to the United States.

The latter case presented the question whether processing taxes paid by the first processor of the

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[1] Meanwhile the Ninth Circuit has decided *United States* v. *Hagan & Cushing Co.*, November 30, 1940, adversely to the Government's position, thus diminishing the possibility of a conflict in the near future.

raw materials used by the contractor in manufacturing the articles sold to the United States and passed on to the contractor might be added to the contract price. This Court held that the contract provided for reimbursement only of taxes imposed directly on the manufacture of the articles and as to which the contractor was the taxpayer. With respect to the price clause the Court concluded that—

> the fair import of the clause is that the United States must make reimbursement only for such taxes as the contractor has paid pursuant to an obligation imposed upon him by the statute which exacts the tax.

This conclusion was reasserted with respect to the phrase "paid by the contractor", for the Court said:

> Moreover, the clause stipulates for reimbursement of taxes "paid by the contractor". It is reasonable to conclude that this phrase also contemplates payment of taxes to the United States in consequence of an obligation imposed by statute upon respondent.

In the instant case, the United States did reimburse the contractor for taxes which at the date of the contract the latter was legally obligated to pay but which in fact it did not pay. In the light of the construction of the tax clause in the *Martin* and *Cowden* cases, the United States was entitled to recover the amounts paid respondent in antici-

pated reimbursement for taxes which the latter was legally obligated to pay on the date the contract was entered into but which in fact were never paid.

The contention that the provisions in question were to be applicable only where *Congress* effected changes in the tax structure imputes to the parties an intention to require Congress to do a nugatory act. Congress could readily have repealed the taxing provisions after the *Butler* decision, and if it had done so, there could be no question that the Government would be entitled to prevail here. But it would have been a useless gesture for Congress to repeal those provisions. Moreover, if Congressional action were necessary in order to produce the price adjustments contemplated by the contract, then it did take such action here when it enacted the comprehensive statutory provisions in 1936 setting forth the conditions upon which refunds might be had, thus giving Congressional recognition to the termination of the processing tax program. Revenue Act of 1936, Secs. 901–917 (c. 690, 49 Stat. 1648).

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted

FRANCIS BIDDLE,
Solicitor General.

APRIL 1941.

APPENDIX

Budget and Accounting Act, 1921, c. 18, 42 Stat. 20:

> SEC. 305. Section 236 of the Revised Statutes is amended to read as follows:
>
> "SEC. 236. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office." [U. S. C., Title 31, Sec. 71.]

Agricultural Adjustment Act, c. 25, 48 Stat. 31, as amended:

> PROCESSING TAX
>
> SEC. 9. (a) To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that any one or more payments authorized to be made under section 8 are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation; * * *. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. The rate

of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that all payments authorized under section 8 which are in effect are to be discontinued with respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture: * * *.

* * * * *

[U. S. C. Supp. V, Title 7, Sec. 609.]

MISCELLANEOUS

SEC. 10. * * *

* * * * *

(c) The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this chapter. Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

* * * * *

[U. S. C. Supp. V, Title 7, Sec. 610.]

COMMODITIES

SEC. 11. As used in this title, the term "basic agricultural commodity" means

wheat, rye, flax, barley, cotton, field corn, grain sorghums, hogs, cattle, rice, potatoes, tobacco, sugar beets and sugarcane, peanuts, and milk and its products, and any regional or market classification, type, or grade thereof; * * *

[U. S. C. Supp. V, Title 7, Sec. 611.]

U. S. GOVERNMENT PRINTING OFFICE: 1941

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OPINION BELOW

The opinion of the court below (R. 9) is reported in 92 C. Cls. 390.

JURISDICTION

The judgment of the Court of Claims was entered January 6, 1941 (R. 10). The petition for a writ of certiorari was filed March 31, 1941 (R. 10), and was granted May 12, 1941 (R. 11). The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Respondent agreed to sell flour to the United States at stated prices. The contracts provided that such prices "include any Federal tax heretofore imposed by the Congress," and that if any taxes are thereafter "imposed or changed by the Congress * * * and are paid to the Government by the contractor" then the contract price "will be increased or decreased accordingly". Certain processing taxes were included in the contract price, but as a result of an injunction against collection, were never paid. The question is whether the contract price should be reduced by the amount of the unpaid taxes.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the statutes and regulations involved are set forth in the Appendix.

STATEMENT

The special findings of fact of the Court of Claims (R. 5–9) may be summarized as follows:

Respondent in 1936 entered into four contracts with the United States covering the sale of wheat flour and wheat bran for a total consideration of $23,288.11. The flour and bran were delivered and vouchers in the amount of $23,288.11 were forwarded to the General Accounting Office (R. 5–7).

Payment of the vouchers was withheld by the Comptroller General, and notices were sent to the respondent during March and May 1937, on the

ground that respondent had been overpaid in an amount aggregating $28,419.20 on eight earlier contracts covering the sale of flour to the United States, entered into between May 1935 and January 6, 1936. This amount represented the Agricultural Adjustment Act processing taxes on the flour covered by the eight contracts, and was arrived at by applying the conversion factor of .704 cents per pound [1] to the total amount of flour delivered under each of the eight contracts (R. 6–8). As a result of an injunction obtained by respondent against the collection from it of any processing taxes, and the decision in *United States* v. *Butler,* 297 U. S. 1, no processing taxes were paid by respondent on the processing of wheat used in the manufacture of the flour covered by the eight contracts and no part of the $28,419.20 was ever paid to the United States (R. 6–8).

Each of the eight contracts contained the following provision (R. 7):

> Prices set forth herein include any Federal tax heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, processing tax, adjustment charge or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this

[1] The finding of the Court of Claims is ".00704 cents per pound," but the error is obvious and typographical. See T. D. 4579, XIV–2 Cum. Bull. 483, 487.

> contract is based and made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract, and are paid to the Government by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly, and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items.

On April 20, 1938, respondent filed this suit in the Court of Claims to recover on the four 1936 contracts, and contested the off-sets claimed by the Government arising out of the eight 1935 contracts (R. 1). The Court of Claims entered judgment in favor of respondent in the amount of $23,288.11, relying primarily upon its earlier decision in *Ismert-Hincke Milling Co.* v. *United States,* 90 C. Cls. 27.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the Comptroller General was not entitled to credit, against amounts due on later contracts, amounts paid respondent on earlier contracts in reimbursement for processing taxes which the contractor never paid.

2. In failing and refusing to hold that respondent was erroneously overpaid under the contracts involved in the amount of the processing taxes included in the contract price.

3. In failing and refusing to hold that the contracts provided for adjustment of the prices therein to compensate for the changes in the applicable federal taxes resulting from the injunction obtained against collection of the taxes and the decision in *United States* v. *Butler,* 297 U. S. 1.

4. In holding that the amounts included in the contract prices to compensate for processing taxes were buried in such prices and could not be segregated therefrom.

5. In failing to hold that price adjustments were necessary notwithstanding the absence of any express congressional repeal of the processing taxes imposed by the Agricultural Adjustment Act.

6. In failing to hold that, if congressional action were necessary, the comprehensive statutory machinery established by Congress in 1936 for refunds of processing taxes constituted such congressional action.

7. In failing to enter judgment for the United States and dismissing the petition.

SUMMARY OF ARGUMENT

A. (1) The tax clause in these contracts provided for price adjustments to reflect any change made in the processing tax "by the Congress." The court below ruled that the invalidation of the processing tax in *United States* v. *Butler,* 297 U. S. 1, was not a change contemplated by the contract. The decision ignores the Revenue Act

of 1936, 49 Stat. 1648. Title VII makes elaborate provision for the refund of processing taxes, Title III taxes the unjust enrichment which arose from passing on to customers the burden of unpaid taxes, and Title IV authorizes floor stocks refunds to those who held goods for sale on January 6, 1936. Each affords explicit recognition by Congress that the processing tax terminated on the date of the decision of this Court in the *Butler* case. The Revenue Act of 1936, accordingly, eliminates the processing tax liability from the statute books. This elimination of liability, even if its practical effect was merely cumulative, was a change made by Congress, within the meaning of the tax clause.

(2) The answer becomes doubly clear when one leaves the bare words of the tax clause of the contract and looks to "the relations of the parties, * * * and the circumstances under which it was signed." *Rock Island Railway* v. *Rio Grande Railroad,* 143 U. S. 596, 609. The Government had a dual relationship with the respondent. It was, on the one hand, the tax collector; on the other, it was the purchaser of taxable articles. The obvious purpose of the tax clause was to insure to the contractor a stable margin of profit and to give to the Government the certainty that increased or decreased tax collections would be precisely offset by corresponding price changes. See *United States* v.

Glenn L. Martin Co., 308 U. S. 62; *United States* v. *Cowden Mfg. Co.*, 312 U. S. 34. This purpose would be frustrated if a tax change so sweeping as complete invalidity were to be ignored.

It is true that the lower courts have consistently ruled that tax clauses in private contracts do not permit recovery by the private vendee. These decisions are inapplicable here. For the private vendee, as the courts have noted, resold the product and recouped the amount of the tax from his customers. Recovery of the amount of the tax from the vendor would, accordingly, simply result in unjust enrichment of the vendee and would be unrelated to the contingency against which the private vendee sought protection: sale of the product in a market in which the prices had been reduced by elimination of the tax liability. Here, the tax clause was designed to guard against a loss in the Government's revenues.

B. The same result is reached even if the tax clause were wholly ignored. The Government and the respondent agreed in the contract that the prices included federal taxes heretofore imposed by the Congress. Both parties assumed that the processing tax would be collectible. This mutual mistake is doubtless one of law and would probably defeat recovery if a private vendee sought to reform the contract. But it is settled that the United States can recover moneys paid out, even under contract, whether the mistake be one of law or of fact. *Wisconsin Central R'd.* v. *United States*, 164 U. S.

190; *Grand Trunk W. R. Co.* v. *United States*, 252 U. S. 112. This basic distinction, rooted in public policy, between the contracts of the United States and those of private persons makes inapplicable the decisions of the lower courts dealing with private vendees.

C. If there were any doubt as to the purpose of the tax clause, or of the right of the United States to recover mistaken payments such as these, it should be removed when it is considered that our arguments are conjoint. The tax clause should operate with added vigor to accomplish the purpose of the parties when through it the Government seeks recovery of mistaken payments, and certainly the United States should recover erroneous payments when in addition the parties have contracted to that same general end.

ARGUMENT

THE UNITED STATES IS ENTITLED TO THE AMOUNT OF THE UNPAID PROCESSING TAX

In a series of contracts respondent agreed to sell flour to the United States at stated prices. The United States possessed a dual relationship to respondent: first, it was the purchaser of a commodity subject to certain federal taxes, and second, it was the sovereign which had imposed and would collect those taxes. With this dual relationship in mind, the parties drew a tax clause designed to obviate the effect upon the contract price and upon the contractor's margin of profit of any subsequent

changes in federal taxes imposed directly on the contract articles. To reach that result they provided that the contract price included any federal tax imposed by Congress prior to the bid date, but that any subsequent changes by Congress in the applicable taxes were to be reflected by changes in the price. The purpose of this provision is clear. The contractor and the United States each were to be protected against subsequent tax changes which would increase costs or diminish revenues.

Respondent was here paid a contract price which included the processing taxes theretofore imposed and was consequently reimbursed for those taxes, even though an injunction had been obtained against their collection. The payments were premised on the assumption by the disbursing officers that the Agricultural Adjustment Act was a constitutional enactment and that the injunction would ultimately be dissolved. But, as a result of *United States* v. *Butler*, 297 U. S. 1, and *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110, the injunction remained in force and the taxes were therefore never paid. Thus, the respondent received reimbursement for taxes which it had not paid and which it had no legal obligation to pay.

It is against the background of these considerations that the contract must be construed. Our position is twofold. We contend, first, that the adjustment provisions in the contract require that the purchase price be reduced by the amount of

the unpaid taxes, and second, that even if there were no such adjustment provisions in the contract respondent was not entitled to reimbursement for taxes which it did not pay. Under either theory the Comptroller General properly deducted the amount of these reimbursed but unpaid taxes from the amounts due respondent.[2]

A. UNDER THE TERMS OF THE CONTRACT THE PRICE SHOULD BE REDUCED IN THE AMOUNT OF THE PROCESSING TAXES

1. *The Change in Tax Liability Comes Within the Language of the Tax Clause.*—Each of the contracts contained the following tax clause (R. 7):

> If any sales tax, processing tax, adjustment charge or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract, and are paid to the Government by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly * * *.

The Court of Claims decided this case upon the authority of its decision in *Ismert-Hincke Milling Co.* v. *United States*, 90 C. Cls. 27. There it held that the contract price should not be reduced by

[2] It is not questioned that, if respondent was overpaid on the earlier contracts, the deductions were proper. See section 305 of the Budget and Accounting Act, *infra*; *United States* v. *Burchard*, 125 U. S. 176, 180.

the amount of the unpaid taxes because "the grounds for any change in the price were stated [in the tax clause] clearly and without ambiguity, leaving nothing to be inferred or implied" (90 C. Cls. at 35). One judge, with whom another concurred in result, reached the same conclusion in *United States* v. *Hagan & Cushing Co.*, 115 F. (2d) 849 (C. C. A. 9). In *United States* v. *American Packing & Provision Co.* (C. C. A. 10), decided Aug. 20, 1941, Prentice-Hall Tax Service, par. 62,898, the court held for the Government on the grounds of equity and good conscience (*infra*, pp. 24–27) but agreed as to the construction of the tax clause. We think that this construction confines the tax clause to words alone, barren of the intent of the parties. Nevertheless even under a literal reading of those words, the tax clause permits adjustment for unpaid processing taxes.

The difficulty here is not, as in *United States* v. *Glenn L. Martin Co.*, 308 U. S. 62, that the tax was not imposed on the production of the articles; it is not, as in *United States* v. *Cowden Mfg. Co.*, 312 U. S. 34, that the tax was imposed upon one other than the contractor. The reason the court below considers the tax clause inapplicable is simply that its adjustments come into play only if the taxes are "changed by the Congress." We submit that the enjoined processing taxes were "changed by the Congress."

The decisions in *United States* v. *Butler*, 297 U. S. 1, and *Rickert Rice Mills, Inc.* v. *Fontenot*,

297 U. S. 110, established that the processing taxes were unconstitutional because part of a program designed to regulate production, and that the taxpayers were entitled to an injunction against their collection. This "change" in the tax, it is true, occurred immediately upon the decision of this Court. But Congress thereafter both recognized and participated in the elimination of the tax liability.

Title VII of the Revenue Act of 1936, 49 Stat. 1648, contains elaborate provision for the refund of processing taxes collected under the Agricultural Adjustment Act, and is plain congressional recognition that the taxes were invalid.[3] Further evidence of congressional participation in the changed tax liability is found in Titles III and IV of the Revenue Act of 1936. Title III taxes the unjust enrichment which arose as a result of passing on to customers the burden of unpaid taxes.[4] The date of termination of the tax (sections 501 (b) and 501 (i) (2), *infra*) is defined in

[3] Section 902, *infra*, forbids refund of taxes collected under that Act only if the claimant did not bear the burden of the tax, and section 906 (b), *infra*, places on the Commissioner the affirmative duty of making the refunds determined by the Board of Processing Tax Review. Section 907 (c), *infra*, defines "tax period" as terminating on the date of the last actual payment, and is a congressional declaration that no tax was thereafter due or collectible. Section 907 (e) (1), *infra*, speaks in terms of "the termination of the tax."

[4] In defining the income as arising from taxes "imposed on such person but not paid" (sec. 501 (a) (1), *infra*), Congress recognized the abolition of liability for unpaid taxes.

section 501 (j) (2), *infra*, to mean "in the case of a Federal excise tax held invalid by a decision of the Supreme Court, the date of such decision." Title IV contains provisions relating to floor stocks, export and charitable refunds.[5] Section 602 (a), *infra*, offers the floor stocks refund to those who held for sale on January 6, 1936, stocks with respect to which a processing tax was due; the committee reports explain that the provision was designed to remove "certain inequities [which] have resulted from the termination of the processing taxes."[6]

There is no express repeal of the processing taxes imposed under the Agricultural Adjustment Act. But these numerous provisions of the Revenue Act of 1936 show explicit recognition by Congress that the processing tax terminated on January 6, 1936, make provision that a decision of invalidity by this Court should be the equivalent of a repeal by Congress, and establish refund procedures based upon the premise that the processing taxes were ineffective.

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[5] Section 601 (a), *infra*, recognizes the invalidity of the Agricultural Adjustment Act tax machinery by expressly reenacting the refund provisions for the purposes of transactions prior to January 6, 1936, the date of the *Butler* decision. See H. Rpt. No. 2475, pp. 13–14, and S. Rpt. No. 2156, pp. 28–29, 74th Cong., 2d Sess. Similarly, section 602 (c) (1), *infra*, defines a taxable commodity as one on which a processing tax was provided for as of January 5, 1936.

[6] H. Rpt. No. 2475, p. 15; see S. Rpt. No. 2156, p. 29, 74th Cong., 2d Sess.

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These provisions show that a change in the respondent's tax burden has been recognized and confirmed by the Congress. This has two consequences in the interpretation of the tax clause. (a) The respondent's tax liability was unenforceable after the *Butler* decision, in the sense that an injunction could readily be obtained against its collection. But not until the Revenue Act of 1936 was it demonstrable from the statute books alone that there no longer was a liability for the processing taxes, and only by that Act was the statutory liability removed.[7] (b) Even if the *Butler* decision were viewed as removing the statutory as well as the actual liability for processing taxes, the Congress thereafter participated in the change in respondent's tax burden. Its confirmation of the *Butler* decision, whatever its practical effect or cumulative nature, was a change

[7] The distinction between judicial invalidation, making the statute unenforceable, and legislative repeal or recognition of invalidity, may sometimes have significant practical consequences. When the 1935 Term of this Court closed one would have supposed that a flour mill in the State of Washington need pay neither processing taxes to the United States nor minimum wages to its female employees. See *United States* v. *Butler*, *supra*; *Morehead* v. *N. Y. ex rel. Tipaldo*, 298 U. S. 587. Had the Washington legislature moved as promptly as Congress to eliminate the statutory duty, neither statute would exist to trouble the miller. But, because there was no legislative recognition of the invalidity of the minimum wage statute, it soon developed that the statute not only remained in formal existence but was enforceable. See *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379.

made by Congress in the respondent's tax liability. Under either theory, the tax clause of the contracts requires that the price of the flour be reduced to reflect the "processing tax * * * changed by the Congress."

2. *The Change in Tax Liability Comes Within the Purpose of the Tax Clause.*—Our argument has so far assumed that the issue is to be settled in terms of the bare words of the tax clause, stripped of any meaning beyond that of its precise words. This, of course, is an artificial assumption.

As this Court has long recognized, contracts between the United States and private persons, like all other contracts, are "to be construed with a view to the real intention of the parties." *United States* v. *Gurney,* 4 Cranch 333, 343. See also, *Hollerbach* v. *United States,* 233 U. S. 165. This requires that the Court, in interpreting a clause of the contract, "consider the relations of the parties, their connection with the subject matter of the contract, and the circumstances under which it was signed." *Rock Island Railway* v. *Rio Grande Railroad,* 143 U. S. 596, 609; see, also, *Smith* v. *Bell,* 6 Pet. 68; *United States* v. *Peck,* 102 U. S. 64.

(a) The purpose of the tax clause found in these contracts is apparent. The dual character of the Government's relationship with respondent has already been noted. The fact that the

Government was the tax collector as well as the purchaser of taxable articles made it desirable that so far as possible the effect of the tax on the contract price would be eliminated, since any tax advantage to one of the contracting parties would result in an equivalent disadvantage to the other. The statute, however, provided no basis for exempting the processor from the tax on articles sold to the Government, and Article 9 (b) of Treasury Regulations 81, *infra*, p. 37, expressly held that processing for, or for sale to, the United States was subject to the tax. It was necessary, therefore, to achieve the desired result by a tax clause such as this.

This Court construed a substantially identical clause in *United States* v. *Glenn L. Martin Co.*, 308 U. S. 62. While it held that Social Security taxes were not imposed "on" the articles sold to the United States, it specifically recognized (p. 64) that the clause was intended to stabilize the contractor's margin of profit so far as taxes imposed on the contract articles were concerned. The Comptroller General, proceeding upon the same premise, has ruled in several instances both before and after the execution of the contracts here involved that under the tax clause the contractor was to be reimbursed only for taxes which he was legally obligated to pay and did pay to the United States. 13 Dec. Comp. Gen. 87 (1933); 14 Dec. Comp. Gen. 338 (1934); 15 Dec. Comp. Gen. 674

(1936). In the first of these decisions it was stated (p. 89):

> The conclusion must be reached that unless a contractor has actually paid to the United States the amount of any processing tax in question such contractor may not receive reimbursement of an amount equivalent thereto from the United States. * * *

Finally, in *United States* v. *Cowden Mfg. Co.*, 312 U. S. 34, this Court similarly indicated that the contract provided for reimbursement only of taxes paid by the contractor. Construing a tax clause identical with that involved in the instant case the Court said (pp. 36, 37):

> * * * the fair import of the clause is that the United States must make reimbursement only for such taxes as the contractor has paid pursuant to an obligation imposed upon him by the statute which exacts the tax.
>
> * * * * *
>
> Moreover, the clause stipulates for reimbursement of taxes "paid by the contractor." It is reasonable to conclude that this phrase also contemplates payment of taxes to the United States in consequence of an obligation imposed by statute upon respondent. * * *

The purpose of the tax clause, then, is clear. The parties were to adjust the contract price to meet tax changes. According as the United States

collected more or less taxes, it was to pay the respondent a greater or smaller purchase price. Thus, the anticipated margin of profit was assured the respondent, whatever the subsequent tax changes; and, whatever those changes, the Government was assured of compensatory price changes to offset tax changes. The evident purpose of the clause and intention of the parties would be frustrated if the clause be construed to exclude a tax change so sweeping as complete invalidity, and elimination of all of the anticipated tax liability.

(b) The tax clause was designed to eliminate the windfall which might otherwise accrue to either the Government or the contractor in consequence of unexpected tax changes. It should be construed so as to preserve the equities of the transaction which the parties sought to insure.

The respondent suggests (Br. in Opp. 19–22) that the unjust enrichment tax imposed by Title III of the Revenue Act of 1936 destroys the equity of the Government's case. But respondent, if it should be required to reduce its sales price by the amount of its unpaid processing taxes, would not be subject to the unjust enrichment tax on these transactions. Section 501 (b) (2), *infra*, excludes the net income from sales with respect to which the taxpayer made a tax adjustment with his vendee, and section 501 (j) (4), *infra*, defines tax adjustment as repayments

"in the bona fide settlement of a written agreement entered into on or before March 3, 1936," a condition which is plainly met in this case. Respondent's complaint makes no claim that it has paid or considers itself liable for the unjust enrichment tax on these transactions.[8] That tax, therefore, does not minimize the inequity of respondent's retention of this windfall.

(c) A number of cases in the lower courts have construed tax clauses in private contracts so as to exclude adjustment of the contract price after the *Butler* decision.[9] Some of these decisions are irrelevant here, because the tax clause contained

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[8] The Comptroller General notified respondent in March 9 and 30 and May 4, 1937, that it was being charged with the amount of these unpaid processing taxes (R. 6–7). Under section 503 of the Revenue Act of 1936, 49 Stat. 1648, respondent's unjust enrichment return would be due (according to the date on which its fiscal year closed) on September 15, 1936, or later. Under section 322 (b) of that Act, respondent could file a claim for refund at least up to July 1939 (within 3 years from date of return, or 2 years from date of payment), which is long after respondent was put on notice that the Comptroller General required a tax adjustment under the contracts in question.

[9] See, also, the decisions denying recovery where the contracts contained no tax clause. *Cohen* v. *Swift & Co.*, 95 F. (2d) 131 (C. C. A. 7), certiorari denied, 304 U. S. 561; *Zinsmaster Baking Co.* v. *Commander Milling Co.*, 200 Minn. 128 (1937) (contract clause not considered at that stage of proceedings); *Thorn* v. *George A. Hormel & Co.*, 206 Minn. 5 (1940); *Mattingly* v. *Smith Milling Co.*, 183 Miss. 500 (1938); *Planters Co.* v. *Brown-Murray Co.*, 128 Pa. Super. Ct. 239 (1937); *Ph. Orth Co.* v. *New Richmond Roller Mills Co.*, 232 Wis. 491 (1939).

no provision for reduction of price [10] or because it was construed as applicable only to the unexecuted portions of the contract and not to past deliveries.[11] But several cases hold that tax clauses contemplating price reductions to offset tax decreases do not warrant recovery after the decision in the *Butler* case.[12] The opinions rely on the absence of an express provision looking to a decision of invalidity by the Supreme Court, and upon the failure of the parties to bill and pay the tax separately from the purchase price of the articles themselves.

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[10] *Continental Baking Co.* v. *Suckow Milling Co.*, 101 F. (2d) 337 (C. C. A. 7).

[11] *Casey Jones, Inc.*, v. *Texas Textile Mills*, 87 F. (2d) 454 (C. C. A. 5); *Golding Bros. Co.* v. *Dumaine*, 93 F. (2d) 162 (C. C. A. 1), certiorari denied, 303 U. S. 660; *O'Connor-Bills, Inc.*, v. *Washburn Crosby Co.*, 20 F. Supp. 460 (W. D. Mo.); *Johnson* v. *Scott County Milling Co.*, 21 F. Supp. 847 (E. D. Mo.); *Carolina Textile Corp.* v. *Eastern Yarn Co.*, 304 Mass. 489 (1939).

[12] *Moundridge Milling Co.* v. *Cream of Wheat Corp.*, 105 F. (2d) 366 (C. C. A. 10); *Consolidated Flour Mills* v. *Ph. Orth Co.*, 114 F. (2d) 898 (C. C. A. 7); *City Baking Co.* v. *Cascade Milling & Elevator Co.*, 24 F. Supp. 950 (D. Mont.); *G. S. Johnson Co.* v. *N. Sauer Milling Co.*, 148 Kan. 861 (1938); *Sparks Milling Co.* v. *Powell*, 283 Ky. 669 (1940); *Crete Mills* v. *Smith Baking Co.*, 136 Neb. 448 (1939); see, also, *United States* v. *American Packing & Provision Co.* (C. C. A. 10), decided Aug. 20, 1941, Prentice-Hall Tax Service, par. 62,898.

In *Johnson* v. *Igleheart Bros.*, 95 F. (2d) 4 (C. C. A. 7), certiorari denied, 304 U. S. 585; *Noll Co.* v. *Sparks Milling Co.*, 304 Ill. App. 624 (1940); and *Southern Biscuit Co.* v. *Lloyd*, 174 Va. 299 (1940), the courts relied equally on the grounds that the contracts did not cover past deliveries and that they did not cover judicial invalidation of the tax.

These decisions do not contradict our position. For the tax clause in private contracts was designed to serve a different purpose than that for which it was used in the Government contracts. The vendees under the former contracts were buying for resale, generally after further processing. The tax burden which they assumed was in turn passed on to their purchasers. The fact that the processor was protected by an injunction against payment of the tax reduced the price to neither his vendee nor to the vendee's customers. Quite naturally, the courts have denied recovery by the vendee of such a windfall, when the tax clauses contemplated a market-wide and simultaneous reduction which would prevent the vendee from recouping the tax burden. They have, accordingly, noted that the buyer would himself be unjustly enriched if he recovered the amount of the tax which had been passed on to his customers.[13]

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[13] Eight of the nine cases (note 12, *supra*) which held that the tax clause in private contracts did not cover invalidation of the tax by this Court have noted this factor. It was an express ground of decision in the *Igleheart* (95 F. (2d) at 9), *Orth* (114 F. (2d) at 903), *City Baking* (24 F. Supp. at 951), *Sauer* (148 Kan. at 869), *Noll* (304 Ill. App. at 629-630), and *Lloyd* (174 Va. at 314) cases. The *Moundridge* case went principally on the ground that the *Sauer* decision was binding (105 F. (2d) at 370). In the *Powell* case, the court assumed (283 Ky. at 671–672) that the seller had paid the tax. The *Crete Mills* case emphasized (136 Neb. at 450, 451) that the seller had paid the unjust enrichment tax under Title III of the Revenue Act of 1936 and that the buyer had refused a rebate based on that portion of the deliveries as to which the

Here, on the other hand, the Government did not buy for resale. Instead, the tax clause was designed to stabilize the transaction so that tax changes, increasing or reducing the revenue of the Government, would be reflected in price changes, increasing or reducing the price paid by the Government, to a precisely compensatory degree. The Government, which could not recoup its tax burden by resale, was thus protected by the tax clause not against a drop in the market price but against a loss in its tax revenues. Thus, the processor's injunctio.. against collection of the tax did not harm his private vendee but did harm the Government. The difference is crucial in the interpretation of the tax clause.

This contrast between the position of the Government and the private vendee, resulting in different purposes to be served by the tax clauses, disposes also of the argument most heavily stressed in denying recovery to the private vendee. That argument is that the amount of the tax is not billed as a separate item but is buried in the total purchase price, and accordingly is not separately recoverable.[14] The tax clause would on first

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seller had paid no processing tax; see, also, *United States* v. *American Packing & Provision Co.* (C. C. A. 10), decided Aug. 20, 1941, Prentice-Hall Tax Service, par. 62,898.

The courts also noted that recovery by the buyer would amount to unjust enrichment because it had in turn passed on the burden of the tax in the *Zinsmaster* (200 Minn. at 133) and *Scott County* (21 F. Supp. at 850) cases.

[14] This ground of decision is mentioned in each of the cases cited above (notes 9 to 12). In *Security Stores* v. *Colorado*

glance be thought a sufficient proof that the parties did in fact view the amount of the tax as a separable item, no matter how the invoices were phrased. But in the case of the private vendee the purpose of the tax clause, to protect him against a market-wide decline in the price of his product, was not fulfilled. Accordingly, it has not been allowed to overcome the inference of the invoices. But where the Government is the vendee, the purpose to be served by the tax clause is fully presented in the noncollection of the taxes. Accordingly, the tax clause remains as an operative guide to the parties' intention and shows that the parties did in truth intend the price to be adjusted according as the taxes were paid or unpaid. The fact that the purchase price did not present the processing tax as a separate item is, therefore, wholly immaterial.

Co., 102 Colo. 471 (1938), the court held a complaint which alleged separate billing of the tax to be good against demurrer. The reasoning reflects the general course of decision in litigation for the recovery by the buyer from the seller of taxes which were reflected in the purchase price but not paid. If the tax was billed separately, a promise to repay the vendee if it is refunded is readily implied. *Wayne County Produce Co.* v. *Duffy-Mott Co.*, 244 N. Y. 351. If buried in the purchase price, the courts see no undertaking to repay the tax any more than any other anticipated but unpaid cost. *Heckman & Co., Inc.*, v. *J. S. Dawes & Son Co.*, 12 F. (2d) 154 (App. D. C.); *Texas Co.* v. *Harold*, 228 Ala. 350 (1933); *Cupples Co., Manufacturers*, v. *Mooney*, 25 S. W. (2d) 125 (Mo. Ct. App., 1930); cf. *Lash's Products* v. *United States*, 278 U. S. 175.

B. WITHOUT REGARD TO THE TAX CLAUSE, THE UNITED STATES CAN RECOVER THE MISTAKEN REIMBURSEMENT FOR UNPAID TAXES

The contracts in question were executed between May 1935 and January 6, 1936 (R. 7). At that time the processing tax collected under the Agricultural Adjustment Act was 30 cents per bushel of wheat, amounting to .704 cents per pound of flour (R. 8). The contract price was 3.23 cents per pound (R. 7). The contracts provided that "Prices set forth herein include any Federal tax heretofore imposed by the Congress which is applicable to the material purchased under this contract" (R. 7).

It is evident that both the United States and the contractor contemplated payment of the processing tax and, as specifically stated in the contract, fixed the price accordingly. It was supposed by both parties to the contract that the respondent was liable for and would pay the processing tax to the United States. Quite obviously, had the parties known that respondent was not liable for and would not pay the tax, the contract price would have been reduced accordingly.

The contract, then, was executed and payment was made at a price which reflected the mutual mistake of the parties. Had the sale been to a private vendee, he probably could not recover because the mistake seems more properly to be considered one of law than of fact.[15] But any such

[15] Even then, the case would not be entirely clear. The general rule is that equity will relieve the parties to a con-

doctrine falls before overriding public policy and does not operate to bar recovery by the United States. Moneys paid out by public officials may be recovered when the payments were based on a mistake of law as well as of fact. *Wisconsin Central R'd.* v. *United States,* 164 U. S. 190, 211–212; *Allen* v. *United States,* 204 U. S. 581; *United States* v. *Wurts,* 303 U. S. 414.[16] The rule applies no less when the mistake is made in the execution or settlement of contracts of the United States. *Steele* v. *United States,* 113 U. S. 128; *United States* v. *Barlow,* 132 U. S. 271, 282; *Grand Trunk Wn. Ry. Co.* v. *United States,* 252 U. S. 112.[17] There is, in short, a "general right of the United States to re-

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tract from a mistake of fact but not of law. *Hunt* v. *Rousmaniere,* 1 Pet. 1, 17. But it is subject to many exceptions, and has been said to be "more honored in the breach than in the observance." *United States* v. *Bentley,* 107 F. (2d) 382, 384 (C. C. A. 2). See, e. g., *Snell* v. *Insurance Co.,* 98 U. S. 85, 90–92; *Philippine Sugar &c. Co.* v. *Phil. Islands,* 247 U. S. 385, 389; *Restatement of Contracts,* American Law Institute, sec. 502, Illus. 4.

[16] See, also, *United States* v. *Saunders,* 79 Fed. 407 (C. C. A. 1); *Leonard* v. *Gage,* 94 F. (2d) 19, 24 (C. C. A. 4); *United States* v. *Bentley,* 107 F. (2d) 382 (C. C. A. 2); *United States* v. *Dempsey,* 104 Fed. 197 (C. C. Mont.); *United States* v. *United States Fidelity & Guaranty Co.,* 151 Fed. 534 (C. C. Md.). The same result was reached, though the question was in form held open, in *McElrath* v. *United States,* 102 U. S. 426, and *United States* v. *Burchard,* 125 U. S. 176.

[17] See, also, *Heidt* v. *United States,* 56 F. (2d) 559 (C. C. A. 5), certiorari denied, 287 U. S. 601; *United States* v. *Sutton Chemical Co.,* 11 F. (2d) 24 (C. C. A. 4); *Cabel* v. *United States,* 113 F. (2d) 998 (C. C. A. 1); *United States* v. *Kerr,* 196 Fed. 503 (C. C. Ore.).

cover moneys paid by the errors of their disbursing officers, as much where the error is one of law as of fact, provided only the moneys belong to the United States *ex aequo et bono.*" *United States* v. *Saunders,* 79 Fed. 407, 408 (C. C. A. 1). The rule reflects the elementary distinction between public and private contracts, for the former are made by "public officers using the funds of the people" and the latter by "individuals dealing with own money where nobody but themselves suffer for their ignorance, carelessness, or indiscretion." *Barnes* v. *District of Columbia,* 22 C. Cls. 366, 394, quoted and approved in *Wisconsin Central R'd.* v. *United States,* 164 U. S. 190, 212.

This distinction makes irrelevant the cases in which the private vendee has been held unable to recover the amount of unpaid taxes which the vendor has included in a composite purchase price.[18] Without a special undertaking to put the seller in funds to meet the tax, represented by a separate billing of the tax, the courts have seen no occasion to relieve the vendee of his failure by contract to specify for return of the part of the purchase price which represents the tax.[19] But where

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[18] The cases are cited in notes 9-12 and 14, *supra.*

[19] Here, in any event, the contract comes within the rule of *Wayne County Produce Co.* v. *Duffy-Mott Co.,* 244 N. Y. 351 (note 14, *supra*). For it specified that the price included existing taxes (R. 7) and the amount of the tax was easily calculable; see *United States* v. *American Packing & Provision Co.* (C. C. A. 10), decided Aug. 20, 1941, Prentice-Hall Tax Service, par. 62,898.

the United States is the buyer, public policy demands that a mistaken expectation that the taxes will be paid be remedied. Otherwise, the seller benefits by a windfall which must be contributed by all the people.[20]

The court in *United States* v. *American Packing & Provision Co.* (C. C. A. 10), decided August 20, 1941, Prentice-Hall Tax Service, par. 62,898, on this ground expressly refused to follow the decisions of the court below and of the Ninth Circuit (*supra*, pp. 10–11). On substantially similar facts it held:

> It is immaterial whether the taxes were paid under mistake of law or fact. * * *
>
> We hold that under the facts here, the Government put the vendor in funds for the payment of a tax, exclusive of the purchase price, calculated by the vendor and which the vendor did not pay, as contemplated by the parties. As a consequence, the vendor received a benefit from the Government, which in justice and good conscience should be returned. The Government having pleaded the same as an equitable setoff, it is entitled to recover against the contract sued upon.

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[20] These considerations are underscored by the contrasting equities between the United States and the private vendee. As we have noted above (pp. 21–22), the latter will ordinarily recoup the tax burden on sale to his customers, while the United States does not resell and at no time is made whole for the loss in tax revenue.

C. THE UNITED STATES IN THE LIGHT OF THE TAX CLAUSE CAN RECOVER THE MISTAKEN REIMBURSEMENT FOR UNPAID TAXES

We have urged that the United States is entitled under the literal terms of the tax clause to recover the amount of the unpaid processing taxes (*supra*, pp. 10–15). Even if the respondent's windfall were not explicitly covered by the tax clause, we have argued that the purpose of that provision yet requires that the amount of the unpaid taxes be deducted from the price (*supra*, pp. 15–23). Finally, without regard to the tax clause, we have relied upon the settled rule that the United States may recover erroneous payments, whether the mistake be one of fact or of law (*supra*, pp. 24–27).

If any one of these positions be sound, the judgment of the Court of Claims must be reversed. But our argument is in truth somewhat broader than the separate parts into which it has been divided. For the judgment of the court below reflects a decision that the doctrine permitting recovery of erroneous payments by the United States is inapplicable, even though the parties by the tax clause plainly intended to stabilize against fluctuating tax burdens both the sellers' margin of profit and the Government's revenues. When these factors are merged, our position becomes even stronger. None of the cases holding that public policy requires recovery by the United States of payments erroneously made by its offi-

cers dealt with a contract through which the parties consciously sought to ensure that result. The result here must accordingly follow *a fortiori*. Conversely, we have urged simply as a matter of contract law and of equity that under the contract the seller should make good through a reduced price the tax revenues lost through the *Butler* decision. If there were doubt as to the force of that argument, it should be dispelled when it is considered that the purchaser was the United States, and that settled public policy dictates recovery of its erroneous payments.

CONCLUSION

It is, therefore, respectfully submitted that the decision of the court below is erroneous and should be reversed.

CHARLES FAHY,
Acting Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
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HUBERT L. WILL,
Special Assistants to the Attorney General.
WARNER W. GARDNER,
Attorney.

SEPTEMBER 1941.

APPENDIX

Budget and Accounting Act, 1921, 42 Stat. 20:

> SEC. 305. Section 236 of the Revised Statutes is amended to read as follows:
>
> "SEC. 236. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office." [U. S. C., Title 31, Sec. 71.]

Agricultural Adjustment Act, 48 Stat. 31, as amended:

> SEC. 9. (a) To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that any one or more payments authorized to be made under section 8 are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation: * * *. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b). Such rate

shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that all payments authorized under section 8 which are in effect are to be discontinued with respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture; * * *.

* * * * *

[U. S. C. Supp. V, Title 7, Sec. 609.]

MISCELLANEOUS

SEC. 10. * * *.

* * * * *

(c) The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title. Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

* * * * *

[U. S. C. Supp. V, Title 7, Sec. 610.]

COMMODITIES

SEC. 11. As used in this title, the term "basic agricultural commodity" means wheat, rye, flax, barley, cotton, field corn, grain sorghums, hogs, cattle, rice, potatoes,

tobacco, peanuts, sugar beets and sugarcane, and milk and its products, and any regional or market classification, type, or grade thereof; * * *.

[U. S. C. Supp. V, Title 7, Sec. 611.]

Revenue Act of 1936, 49 Stat. 1648:

SEC. 501. TAX ON NET INCOME FROM CERTAIN SOURCES.

(a) The following taxes shall be levied, collected, and paid for each taxable year (in addition to any other tax on net income), upon the net income of every person which arises from the sources specified below:

(1) A tax equal to 80 per centum of that portion of the net income from the sale of articles with respect to which a Federal excise tax was imposed on such person but not paid which is attributable to shifting to others to any extent the burden of such Federal excise tax and which does not exceed such person's net income for the entire taxable year from the sale of articles with respect to which such Federal excise tax was imposed.

(2) A tax equal to 80 per centum of the net income from reimbursement received by such person from his vendors of amounts representing Federal excise-tax burdens included in prices paid by such person to such vendors, to the extent that such net income does not exceed the amount of such Federal excise-tax burden which such person in turn shifted to his vendees.

(3) A tax equal to 80 per centum of the net income from refunds or credits to such person from the United States of Federal excise taxes erroneously or illegally collected with respect to any articles, to the extent that such net income does not exceed

the amount of the burden of such Federal excise taxes with respect to such articles which such person shifted to others.

(b) The net income (specified in subsection (a) (1)) from the sale of articles with respect to which the Federal excise tax was not paid, and the net income specified in subsection (a) (2) or (3), shall not include the net income from the sale of any article, from reimbursement with respect to any article, or from refund or credit of Federal excise tax with respect to any article (1) if such article (or the articles processed therefrom) were not sold by the taxpayer on or before the date of the termination of the Federal excise tax; (2) if the taxpayer made a tax adjustment with respect to such article (or the articles processed therefrom) with his vendee; or (3) if under the terms of any statute the taxpayer would have been entitled to a refund from the United States of the Federal excise tax with respect to the article otherwise than as an erroneous or illegal collection (assuming, in case the tax was not paid, that it had been paid).

* * * * *

(j) As used in this section—

* * * * *

(2) The term "date of the termination of the Federal excise tax" means, in the case of a Federal excise tax held invalid by a decision of the Supreme Court, the date of such decision.

* * * * *

(4) The term "tax adjustment" means a repayment or credit by the taxpayer to his vendee of an amount equal to the Federal excise tax with respect to an article (less reasonable expense to the vendor in con-

nection with the nonpayment or recovery by him of the amount of such tax and in connection with the making of such repayment or credit) if such repayment or credit is made on or before June 1, 1936, or thereafter in the bona fide settlement of a written agreement entered into on or before March 3, 1936.

* * * * *

SEC. 601. REFUNDS UNDER AGRICULTURAL ADJUSTMENT ACT ON EXPORTS, DELIVERIES FOR CHARITABLE DISTRIBUTION OR USE, ETC.

(a) The provisions of sections 10 (d), 15 (a), 15 (c), 16 (e) (1), 16 (e) (3), and 17 (a) of the Agricultural Adjustment Act, as amended, are hereby reenacted but only for the purpose of allowing refunds in accordance therewith in cases where the delivery for charitable distribution or use, or the exportation, or the manufacture of large cotton bags, or the decrease in the rate of the processing tax (or its equivalent under section 16 (e) (3)), took place prior to January 6, 1936.

* * * * *

SEC. 602. FLOOR STOCKS AS OF JANUARY 6, 1936.

(a) There shall be paid to any person who, at the first moment of January 6, 1936, held for sale or other disposition (including manufacturing or further processing) any article processed wholly or in chief value from a commodity subject to processing tax, an amount computed as provided in subsection (b), except that no such payment shall be made to the processor or other person who paid or was liable for the tax with respect to the articles on which the claim is based.

* * * * *

(c) As used in this section—

(1) The term "commodity subject to a processing tax" means a commodity upon the processing of which a tax was provided for under the Agricultural Adjustment Act, as amended, as of January 5, 1936.

* * * * *

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, * * *.

* * * * *

SEC. 906. PROCEDURE ON CLAIMS FOR REFUNDS OF PROCESSING TAXES.

* * * * *

(b) There is hereby established in the Treasury Department a Board of Review (hereinafter referred to as "the Board"). * * * The Board shall have jurisdiction in proceedings under this section to review the allowance or disallowance of the Commissioner of a claim for refund, and to determine the amount of refund due any claimant with respect to such claim. The Commissioner shall make refund of any

such amount determined by a decision of the Board which has become final. The proceedings of the Board and its divisions shall be conducted in accordance with such rules and regulations as the Board may prescribe, with the approval of the Secretary.

* * * * *

SEC. 907. EVIDENCE AND PRESUMPTIONS.

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

* * * * *

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. * * *

* * * * *

(e) Either the claimant or the Commissioner may rebut the presumption estab-

lished by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. Such proof may include, but shall not be limited to—

(1) * * * If the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. * * *

* * * * *

Treasury Regulations 81, promulgated under the Agricultural Adjustment Act:

ART. 9. *Exemptions from processing tax.*—

* * * * *

(b) *Processing by, or for, or for sale to, the United States, a State, or the instrumentality of either.*—Processing for, or for sale to, the United States, a State, a Territory, or a possession, is subject to the tax, whether or not the commodity or the product derived from the commodity is owned by the United States, such State, such Territory, or such possession. Where a State of the United States is engaged in the business of processing, or in processing and the business of selling the articles resulting from such processing, such processing is

subject to tax, and such State is liable, as processor, for the tax. Where a State of the United States is neither engaged in the business of processing, nor engaged in processing and the business of selling articles resulting from the processing, and the processing and disposition of the articles processed are done by the State itself in the exercise of an essential governmental function, such processing is not subject to tax, and such State is not liable for the tax.

U. S. GOVERNMENT PRINTING OFFICE : 1941

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 45

THE UNITED STATES, *Petitioner*,

v.

THE KANSAS FLOUR MILLS CORPORATION.

On Petition for Writ of Certiorari to the Court of Claims of the United States.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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OPINION BELOW.

The opinion of the Court of Claims was entered January 6, 1941 and is as yet unreported.

JURISDICTION.

The judgment of the Court of Claims was entered January 6, 1941. (R. 10) The petition for writ of certiorari was filed March 31, 1941. Service was had and acknowledged by the respondent on April 14, 1941. The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED.

The question presented is as follows:

> Has the United States, a purchaser of flour from the respondent at *a composite price*, the legal right under the express terms of the contract written by the Government and signed by both parties to recover from the respondent a part of the said *composite price* which the United States alleges was paid by it to respondent to use for payment of a processing tax imposed upon respondent under the provisions of the Agricultural Adjustment Act which, *although not mentioned in the contract*, was later declared unconstitutional, thus relieving respondent of the tax?

STATEMENT.

Respondent is a corporation organized and existing under the laws of the State of Delaware with its principal office in Kansas City, Missouri and at all times mentioned herein was engaged in the business of manufacturing flour and related products from wheat for sale to various buyers including the United States. (R. 6) The respondent sold to the United States under contracts dated May 12, June 27, July 31 and December 4, 1936, wheat flour and wheat bran for a total consideration of $23,288.11. (R. 6-7) The flour and bran were delivered and accepted by the United States and vouchers in the amount of $23,288.11 were forwarded to the General Accounting Office for payment. (R. 6-7) The payment of these vouchers was withheld by the Comptroller General and the amount credited by him against an alleged indebtedness of a larger amount on account of alleged overpayments made by the petitioner to the respondent under certain other contracts referred to hereinafter. (R. 6-7)

During the period from May, 1935 to January 6, 1936 respondent had sold to the United States under contract approximately 3,383,000 pounds of flour. The flour was sold to the United States at *a composite price* and an excerpt

from one of the contracts between the respondent and the United States typical of the price provision contained in all of the contracts of sale and in all the invoices issued to the United States by the respondent follows: (R. 7)

Item	Pounds (about)	Unit price (per pound)	Total contract price
Lb. Flour, wheat, in sacks, Type A	78,400	0.0323	$2,532.32

Each of the contracts contained the following provision: (R. 7)

> "Prices set forth herein include any Federal tax heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, processing tax, adjustment charge or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract, and are paid to the Government by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly, and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items."

The respondent delivered the flour under the contracts, the same was accepted by the United States and payment made therefor in accordance with the bid price. (R. 7) Along with other wheat processors the respondent had during the period from May, 1935 to January 6, 1936 applied for and obtained from the United States District Court an injunction prohibiting the Collector of Internal Revenue from the collection of any processing taxes from it during this period. (R. 8) The Secretary of Agriculture prior to May, 1935 in accordance with authority vested in him by the provisions of the Agricultural Adjustment Act of May 12, 1933 (48 Stat. 31), as amended, had, by Wheat Regula-

tions approved by the President, established the rate of tax on first domestic processing of wheat at 30 cents per bushel of wheat processed, and the conversion factor as applied to floor stocks of flour was fixed at .00704 cents per pound. (R. 8)

The petitioner has identified certain contracts entered into between it and the respondent during the period from May 1935 to January 6, 1936 and by multiplying the total number of pounds of flour provided for by the contracts by the conversion factor applicable to floor stocks, .00704, has arrived at an amount of the alleged indebtedness of the respondent to the United States amounting to $28,419.20. (R. 8) The amount for which judgment has been rendered of $23,288.11, which is admitted to be owing to the respondent, has been by the Comptroller General credited against the alleged indebtedness of the respondent to the United States in the amount of $28,419.20. (R. 8-9) On April 20, 1938 a petition was filed in the Court of Claims by the respondent to recover the $23,288.11 owing to it by the United States on account of flour delivered and accepted under contract subsequent to January 6, 1936 and which had by the Comptroller General been credited against the alleged indebtedness of the respondent to the United States in the amount of $28,419.20. (R. 8-9) The Court of Claims entered judgment in favor of the respondent in the amount of $23,288.11 on January 6, 1941. (R. 10)

SUMMARY OF ARGUMENT.

I

The question here presented has been carefully considered in numerous decisions rendered by Federal and State Courts and the opinions are unanimous in support of the decision of the Court of Claims. This Court has considered and denied petitions for certiorari.

II

The contract which constitutes the basis for the controversy is clear and unambiguous. It must be construed in

accordance with the express language contained therein, a thorough analysis of which has been made by this Court and by the court below.

III

It has long been established as a matter of law that a composite price cannot be disintegrated so as to identify the various elements of costs of which the tax constitutes a unit.

IV

Congress enacted Title III of the Revenue Act of 1936 establishing a formula to be used as a basis for the recovery by the United States of any escaped processing tax, in the event the processor was unjustly enriched, and an interpretation of the contract here under consideration as now advocated by the United States might seriously affect the collection of revenue and cause a large amount of unwarranted litigation.

ARGUMENT.

I.

The question here presented has been carefully considered in numerous decisions rendered by Federal and State Courts and the opinions are unanimous in support of the decision of the Court of Claims. This Court has considered and denied petitions for certiorari.

The so-called tax clause which is here under consideration is typical of those which were made a part of all contracts between vendees and processors in connection with the sale of products during the period within which the processing tax was effective. The actual wording of the clause appearing in the contracts differed even insofar as the Government was concerned, but the substance and effect thereof was the same. These different wordings were examined by the Court of Claims when it decided the case of *Ismert-Hincke Milling Company* v. *United States*, 90 Ct. Cls. 27. In this connection the Court stated after considering,

among others, the case of *Continental Baking Company* v. *Suckow Milling Co.*, 101 Fed. (2d) 337, (C. C. A. 7):

> "The opinion of the Court in the case above cited considered a large number of cases involving the question of the right of the purchaser to recover the amount of the tax under circumstances similar, or nearly similar, and held in effect that there could be no recovery where the tax was absorbed in the price and was not a separate item thereof."

Again the Court said:

> "While some verbal differences may be found in the terms of the contracts involved in the cases cited to support plaintiff's contentions, these differences do not affect the principle laid down therein or the rules which determine defendant's right to recover."

In most of the cases decided by the Courts in which this type of tax clause was involved it will be found that the provisions of the contract are set out in either the decision of the Court or the notes accompanying the same, either in substance or verbatim. For the sake of brevity these clauses considered by the various Courts are not set out in this brief.

In support of our petition in opposition to the granting of the writ of certiorari we respectfully call attention of the Court to the following decisions:

O'Connor-Bills, Inc. v. *Washburn Crosby Co.*, 20 F. Supp. 460, decided August 31, 1937, U. S. D. C., West. Div. West. Dis. of Mo.

Golding Bros. Co., Inc. v. *Dumaine*, 93 Fed. (2d) 162, (C. C. A. 1), decided December 8, 1937. The Court citing with approval the following:

Zinsmaster Baking Co. v. *Commander Milling Co.* (Minn.) 273 N. W. 673.

Cupples Co., Mfrs., v. *Mooney*, (Mo. App.) 25 S. W. (2d) 125.

Moore v. *Des Arts*, 1 N. Y. 359.

Kastner v. *Duffy-Mott Co.*, 125 Misc. 886, 213 N. Y. S. 128.

Christopher v. Wright & Co., Inc., 160 Misc. 23, 289 N. Y. S. 105.

Texas Company v. Harold, 219 Ala. 356, 153 So. 442, 92 A. L. R. 323.

Corey Jones, Inc. v. Texas Textile Mills, Inc., (5th Cir.) 87 Fed. (2d) 414.

Hitchcock & Co., Inc. v. T. S. Brown & Son Co., Inc., 56 App. D. C. 233, 12 Fed. (2d) 154.

Johnson v. Scott County Milling Company, 21 F. Supp. 847, decided November 28, 1937, U. S. D. C., East. Dist. of Mo.

Cohen v. Scott & Co., 95 Fed. (2d) 133, (C. C. A. 7), decided Feb. 18, 1938.

D. F. Johnson v. Igleheart Bros., Inc., 95 Fed. (2d) 4, (C. C. A. 7), decided February 11, 1938.

G. S. Johnson v. Sauer Milling Co., 84 Pac. (2d) 504, 149 Kan. 861, decided December 19, 1938.

Continental Baking Co. v. Nuckles Milling Company, 101 Fed. (2d) 337, (C. C. A. 7), decided January 7, 1939.

Ismert Hincke Milling Co. v. United States, 90 Ct. Cls. 27, decided November 6, 1939, Reh. denied Feb. 6, 1940.

Meaudridge Milling Co. v. Crown of Wheat, Inc., 105 Fed. (2d) 366, (C. C. A. 10), decided June 15, 1939.

United States v. Hogan & Cushing Co., 115 Fed. (2d) 849, (C. C. A. 9), decided November 30, 1940.

Of the above stated cases, petitions for writ of certiorari were considered by this Court and denied in the following:

Cohen v. Scott & Company, 95 Fed. (2d) 133 (C. C. A. 7, Cert. denied 304 U. S. 563.

D. F. Johnson v. Igleheart Bros. Inc., 95 Fed. (2) 4, C. C. A-7, Cert. denied 304 U. S. 585, Reh. denied Oct. 10, 1938.

Golding Bros. Co. Inc. et al. v. Dennison et al., 93 Fed. (2d) 162 C. C. A-1, Cert. denied 303 U. S. 660.

II.

The contract which constitutes the basis for the controversy is clear and unambiguous. It must be construed in accordance with the express language contained therein, a thorough analysis of which has been made by this Court and by the court below.

At the time the respondent and the United States entered into the contracts, here in controversy, both parties had been for approximately two years fully aware of the existence of the Agricultural Adjustment Act and knew that thereunder the power to establish the amount and measure of the tax was delegated by Congress to the Secretary of Agriculture and was subject to change by him if conditions warranted.

It is obvious from the clear language of the "up and down" clause that both parties were desirous of protecting themselves against a change in the processing taxes or other taxes imposed or changed by Congress after the date for the opening of the bids, and *before the delivery of the supplies provided in the particular contracts.* Neither party at the time of the signing of the contracts did or could have anticipated that the Agricultural Adjustment Act would be held to be unconstitutional by the Supreme Court of the United States, or what would happen with respect to other contracts which might be entered into after the fulfilment of the contracts then executed. If the United States could have anticipated such a happening, it no doubt would have provided against it by supplying in the contract appropriate language to cover the situation and would no doubt have required that the alleged tax be set out separately in the invoice which, no doubt, would have altered the amount of the bid-price.

Its failure to anticipate that situation cannot be corrected by reading into the contract language which clearly does not appear therein.

The contract was written by the Government and was submitted on its own printed form. The rule under the

circumstances requires strict construction and in case of any doubt same must be resolved against the maker of the contract, which in this case is the United States.

A brief analysis of the provisions of the contract here under consideration will serve to demonstrate conclusively that the United States is without right to recover thereunder.

(a) The first provision is:

> "Prices set forth herein include any Federal tax heretofore imposed by the Congress which is applicable to the material purchased under this contract."

It is plain that the above stated provision was made for the express protection of the vendee. In other words, both parties were aware of the existence of certain Federal taxes for which liability rested upon the vendor. It was incumbent upon the vendor to pay such taxes from the funds collected from the vendee or from other funds in its possession and no addition could be made to the prices fixed by the contract to provide for the payment of existing taxes.

(b) The second provision is:

> "If any sales tax, processing tax, adjustment charge or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture or sale of the supplies covered by this contract—"

The expression of the parties in the above wording is plain and unambiguous and sets forth the only exception or contingency recognized as possible or that was anticipated as in any way affecting the contract prices as fixed by the contracts. It was mutually recognized that Congress had the power to and might alter the taxes or other charges applicable to the supplies after the award of the contract and prior to its consummation.

"(c) Third, if changes or alteration in the taxes were made by the Congress between the date of award and the date of fulfilment of the contractual obligation the parties agreed:

> "and are paid to the Government by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly, and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items."

Congress did not make any change in the taxes or other charges affecting the prices of the supplies furnished under the contract between the date of the award and the completion of the contract or at any other time. The petitioner received that for which it bargained and paid therefor the contract price. The contract having been fully discharged, there being no basis for a claim "of fraud or mutual mistake," there existed no further liability on the part of either party. As will be observed from the finding of fact of the court below, the prices were composite and no provision was made in the contract or by the parties otherwise to segregate them into individual elements so as to discover what part thereof, if any, represented a processing tax.

Finally, and of vital importance, the parties made no mention of and therefore it must be concluded that there was no intention to provide for any adjustment in case the Agricultural Adjustment Act was declared unconstitutional.

It is a matter of record that during the period from May, 1935 to January 6, 1936, familiarly known among processors as "the injunctive period," when the courts had ordered the impounding of funds with which to pay the tax pending the outcome of the litigation, numerous vendees attempted to intervene on the grounds that they had an interest in said funds but the courts refused to recognize such claimed right.

After January 6, 1936, when the Agricultural Adjustment Act was declared unconstitutional by the Supreme Court in the case of *United States* v. *Butler*, 297 U. S. 1, the vendees

renewed their efforts to establish a legal right to collect from the processors.

In one of the earlier cases decided, *O'Connor-Bills, Inc.* v. *Washburn Crosby Company*, 20 Fed. Supp. 460, the United States District Court for the Western District of Missouri, Western Division, in a well reasoned opinion passed upon a contract between a vendor and a vendee which, like the one here under consideration, was plain in its terms. The Court said:

> "This constituted an agreement between the parties as to the procedure to be followed if the tax should be decreased. The decrease was to be credited against the contract prices named in this contract.
>
> "Undoubtedly it was then believed that the decrease might be authorized before the execution of the contract and the payment of the amount due thereon by the plaintiffs. *The agreement did not provide for a refund if the contracts had been executed or fully carried out, nor neither did it provide for a credit or refund in the event the tax was held illegal.* The plaintiffs were not deceived nor over-reached in making the payment; therefore they lost all title and legal interest in the funds thus paid. Shell Oil Co. v. Miller, Inc. (C. C. A.) 53 F. (2nd) 74; Wourdack v. Becker, Collection (C. C. A.) 55 F. (2nd) 840; Lash's Products Co. v. U. S., 278 U. S. 175. (Italics ours)
>
> "The contracts of the parties specifically provided the procedure for giving the several plaintiffs the benefit of a decrease in the tax. At most, it would become a credit in their favor against the defendant, and clearly would constitute no other relation save that of debtor and creditor. The defendant, therefore, holds no specific funds in which the plaintiffs would have an interest and under their plain contracts with the defendant they are not entitled to an accounting."

The identical clause here under consideration has been submitted to this Court in the case of *United States* v. *Glenn L. Martin Co.*, 308 U. S. 62 and *United States* v. *Cowden Manufacturing Co.*, decided by this Court January 13, 1941, (Reh. denied Feb. 10, 1941).

In the *Martin* case the company had sued for a refund of social security taxes which it had been required to pay after it had entered into a contract to furnish airplane parts. This Court decided that such taxes were not specifically mentioned in the contract and, therefore, could not be recovered.

The Cowden Manufacturing Company paid a tax on the cotton cloth which was used to manufacture mechanic's type suits. This Court denied the right of the company to recover from the Government under the identical contract provision because the contract stated that the taxes must be imposed upon the "supplies", interpreted by the Court to mean mechanic's suits, and not the cloth used in the making thereof. In the *Martin* and *Cowden* cases the Government advocated before this Court a strict construction of the contractual clause, whereas in this case the Government takes the opposite view, and would have the Court read into the contract provisions neither thought of nor present. The rule with respect to interpretation of a contract with respect to the maker thereof is well stated by the Court in *Sternberg v. Drainage District*, 44 Fed. (2d) 560, 562 (C. C. A. 8):

> "It is first to be observed that the instrument forming the basis of this controversy was prepared by the contractors and presented to the commissioner of the defendant. If the contract is ambiguous, the plaintiff is responsible for its ambiguity, and, under such circumstances, the contract should be construed most strongly against the party preparing it."

In *Northern Pacific Railroad Co. v. Twohy Bros. Company*, 95 Fed. (2d) 220 (C. C. A. 9), the Court said:

> "However, were the term 'work' still ambiguous as to its interpretation, we are required to interpret it against the railway, since it prepared the contract headed 'Form 109-A General Contract' which the contractor signed."

To the same effect see *Bankers Mortgage Company v. Dale*, 130 Kan. 372, and *Green v. Royal Neighbors of America*, 146 Kan. 571, where it is stated by the Court:

> "There is an elementary rule of law that where one party to a contract is privileged to set down in writing the terms at which another party is to give asset, and a controversy arises as to their meaning, the contract should be construed strictly against the writer and liberally toward the other party."

In the case of *D. V. Johnson* v. *Iglehart Bros., Inc., supra*, with respect to a contract similar to that here under consideration, the Court said:

> "It is urged upon us, however, that notwithstanding the want of express language to cover the situation presented, the court should construe the contracts as containing an implied promise to refund to the plaintiff that part of the purchase price which went to make up the processing tax. In other words, we are asked, by construction, to afford the plaintiff protection against a contingency other than that which the parties themselves provided."

After reviewing and citing specific language taken from several authorities upon the construction of the express provisions as a contract the Court concludes:

> "Other authorities could be quoted to the same effect. It seems clear to us that the law is well settled that where parties expressly contract, under what circumstances an obligation may arise with reference to a certain subject matter, where the same is entered into without fraud or mutual mistake, it excludes the possibility of an implied covenant of a contradictory or different nature. In the instant case, the alleged implied covenant, of course, is not contradictory to those expressly made, but it certainly is different and in addition thereto. There is no claim of fraud or mutual mistake; the parties were dealing at arms' length and so far as is shown, there was no effort or intention on the part of either to prevent the other from incorporating any provision necessary for the protection of the contracting parties. If the parties had desired or intended to provide for the contingency here presented, they could and, no doubt, would have done so. *Generallia Specialibus non Derogant.*"

Any proper interpretation of the contract under consideration must recognize that it contained no provision which contemplated the unconstitutionality of the Agricultural Adjustment Act or the refund to petitioner of any part of the sale price of the product. To hold otherwise would be to supply language which does not exist, is not implied and would not carry out the intention of the parties and which has been consistently refused by the Courts.

As is stated by the Court of Claims in the case of *Ismert-Hincke Milling Company* v. *United States*, *supra*:

> "It should be kept in mind in this connection that the contracts upon which suit was brought contained no provision that the amount of the tax should be refunded to the defendant in event the tax was held unconstitutional or invalid, or for any other reason was not paid by the plaintiff."

In that case the Court had under consideration the identical contractual provision as applied to the same facts and circumstances as exist in this case.

III.

It has long been established as a matter of law that a composite price cannot be disintegrated so as to identify the various elements of costs of which the tax constitutes a unit.

It has been found as a fact by the Court of Claims (R. 7) that there was only one price stated by the petitioner to the purchaser of the flour and wheat bran. This was a composite price.

The courts had definitely decided prior to the existence of the Agricultural Adjustment Act, which provided for the processing tax, that where the price is billed to the purchas as a total sum, the purchaser can claim no interest therein on account of the existence of the tax. In order that the purchaser may have an interest in the tax paid by the seller the tax must have been billed to him as a separate item and

he must have put the purchaser in the specific funds used to pay the tax.

Treasury Regulations 47, Revenue Act 1924
Heckman & Co. v. *I. S. Dawes & Sons Co.*, 12 Fed. (2d) 154
Wayne County Produce Co. v. *Duffy-Mott Co.*, 244 N. Y. 351; 155 N. E. 669
Lash's Products Co. v. *U. S.*, 278 U. S. 175
Boyle Valve Co. v. *U. S.*, 69 Ct. Cl. 129; 38 Fed. (2d) 135
U. S. v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386.

The distinction as between a tax separately billed and a composite price which may or may not contain the unit of tax is clearly pointed out in the *Wayne County Product Co.* v. *Duffy-Mott Co.* case, *supra*, by Mr. Justice Cardozo, then Chief Justice of the Court of Appeals of New York. In that case the purchaser had contracted to pay a certain price for the goods plus a tax of 10 per cent. it was there said:

> "This is not a case where the item of the tax is absorbed in a total or composite price to be paid at all events. In such a case the buyer is without remedy, though the annulment of the tax may increase the profit to the seller. Moore v. Des Arts, 1 N. Y. 359. This is a case where the promise of the buyer is to pay a stated price, and to put the seller in funds for the payment of a tax besides. In such a case the failure of the tax reduces to an equivalent extent the obligation of the promise."

It is also pertinent to point out the following statement made by Mr. Justice Holmes in the case of *Lash's Products Co.* v. *the United States*, *supra:*

> "The phrase, 'passed the tax on' is inaccurate, as obviously the tax is laid and remains on the manufacturer and on him alone. Heckman & Co. v. I. S. Dawes & Son Co., 12 F. (2nd) 154. The purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation but that is all. • • •

> "* * * The price is the total sum paid for the goods. The amount added because of the tax is paid to get the goods and for nothing else. * * *"

The long line of cases decided by both the Federal and State courts in 1937, 1938 and 1939 have cited the above cases with approval, as being well established law and have applied them to the "processing taxes" illegally levied under the Agricultural Adjustment Act, the principle being when the price is billed in a total sum and no segregation made as to the tax then the vendee pays the price solely to obtain the products even though the price may have been greater because of the existence of the illegal tax.

The courts have refused to permit any segregation of the price into component parts whether or not there existed between the parties contracts containing the "increase or decrease" clause which is here under consideration. It is obvious whether or not there were contracts in existence containing the "increase and decrease" clause that the parties never intended any adjustment in the price unless the Secretary of Agriculture had adjusted the rate of the tax during the period of the performance of the particular contracts. It is reasonable to assume that during the period when the injunctions against the collection of the illegal tax were effective, from May, 1935 to January 6, 1936, that the prices which the vendors were able to obtain from the vendees were lower than those obtained during the period when the illegal taxes were being paid, because of the uncertainty then existing as to the legal status of the tax. While the facts in the instant case are, perhaps, by the very nature of things, slightly different from the facts in some of the cases decided by the courts, yet the principle of law that the vendees had no legal interest in the total price of the product by reason of a clause in the contracts such as is here under consideration is definitely established.

In *Golding Bros Co., Inc.* v. *Dumaine*, 93 Fed. (2d) 162, (C. C. A. 1), the Court said:

"It seems to be well settled that, where a sales contract provides that the purchaser is to pay a stated price and that alone, the purchaser cannot recover from the seller the amount of the tax, if the tax is later done away with by a repeal of the statute or by its being declared unconstitutional, or, if the tax is simply reduced, recover the amount of the reduction, even though the tax had not been paid by the vendor, or, if paid, refunded to him."

With respect to the rights of the vendee to recover where flour had been sold at a composite price, the Supreme Court of Mississippi has said in the case of *L. L. Mattingly, et al.* v. *G. B. R. Smith Milling Company*, 184 So. 635:

"The record shows that all the flour was sold to appellants at a flat or total or composite stated price, per barrel, not at a certain price per barrel, plus the processing tax of $1.38. In so far as the tax may have been taken into consideration at all in fixing the sales price, it was indistinguishably incorporated into, and absorbed along with, all the other items of cost or expense which went to make up the total sales price per barrel; and it is now thoroughly well settled that when the tax item or any other item has been indistinguishably intermingled or absorbed in a total or composite stated price to be paid on delivery of the purchased article, the buyer is without remedy, though the annulment of the tax may increase the profit of the seller."

The Supreme Court of Kansas passing on the same situation in the case of *Johnson* v. *Sauer Milling Co.*, 84 Pac. (2d) 934, 148 Kan. 861, said:

"In the case before us the contract was entered into on November 6, 1935, long after the processing tax became effective. The only price mentioned in the contract was a price in gross per barrel. Evidently that price included the ad valorem taxes, the cost of milling, selling, insurance, etc. The tax was measured not on the flour, but upon the wheat. The tax imposed was 30 cents per bushel of wheat of 60 pounds, computed and fixed at $1.38 per barrel of flour. It is clear the item of

the tax was absorbed in the total or composite price to be paid for flour sold.

"The contract did not provide for a credit or refund to the buyer in the event the tax was held illegal. This contingency was not in the contract. It is not contended there was fraud or mutual mistake, and no valid reason has been suggested why the agreement should not be enforced as written."

The Court of Claims in the case of *Ismert-Hincke Milling Company* v. *The United States*, *supra*, after considering the various cases states as follows:

"Accordingly the Circuit Court of Appeals in the Continental Baking Co. case, supra, dismissed the action of the plaintiff stating, among other things, as a reason for its decision that—

" 'The contract does not contain any provision for the refund of any part of the purchase price in the event the processing tax should be annulled,'

"and that

" 'plaintiff did not pay two separate funds to the defendant, namely, a fund for the flour and fund for the tax, but on the contrary, * * * there was but one price named in each of the contracts.'

"It will be observed that the same condition existed in the case at bar."

To say that a part of the *composite* contract price represented a tax recoverable by the Government would be to upset the law which has been established for years. It would invalidate regulations of the Commissioner of Internal Revenue which have long had congressional approval and have been sustained by the Courts. The position of the Solicitor General here is contrary to that advocated heretofore.

Note the statement of this Court in *Lastis Products Company* v. *United States*, *supra*.

IV.

Congress enacted Title III of the Revenue Act of 1936 establishing a formula to be used as a basis for the recovery by the United States, of any escaped processing tax, in the event the processor was unjustly enriched, and an interpretation of the contract here under consideration as now advocated by the United States might seriously affect the collection of revenue and cause a large amount of unwarranted litigation.

Congress as a part of the Revenue Act of 1936, approved June 11, 1936, enacted Title III (U. S. C. A. Title 26, Sec. 700), which provided

> "Title III—Tax on Unjust Enrichment Sec. 501. Tax on Net Income From Certain Sources.
>
> "(a) The following taxes shall be levied, collected, and paid for each taxable year (in addition to any other tax on net income), upon the net income of every person which arises from the sources specified below:
>
> "(1) A tax equal to 80 per centum of that portion of the net income from the sale of articles with respect to which a Federal excise tax was imposed on such person but not paid which is attributable to shifting to others to any extent the burden of such Federal excise tax and which does not exceed such person's net income for the entire taxable year from the sale of articles with respect to which such Federal excise tax was imposed."

In connection with the above, we respectfully call attention of the Court to a discussion of the legislative history of the above stated section of the 1936 law as recited in *Seidman's Legislative History of Federal Income Tax Laws*, 1938—1861, pages 266-269. We particularly call attention to the following discussion which appears on pages 267, 268:

> "Mr. Vinson of Kentucky. If he is in the red and does not make a net profit on the business, if he does not make any income on the transactions involved, there is no tax. If you multiply nothing by 80 percent, of course the tax is nothing.

"Mr. Harlan. Is the tax based on 80 percent of the unjust profits, or is it on the income?

"Mr. Vinson of Kentucky. It is the unjust profits counted in with his business. (p. 6093)

"Mr. Colden. Why should not the Government retax the whole amount instead of 80 percent?

* * *

"Mr. Houston. And 20 percent is ample to take care of all expenses—bookkeeping and all expenses incidental to the collection of the money?

"Mr. Cooper of Tennessee. We think so. In other words, what we hoped to accomplish was simply this: The ideal we had before us was that no man in this country should be enriched by one penny by reason of collecting this tax and passing it on to his customers and failing to pay it to the Government and at the same time no man should be caused to suffer a loss by reason of the processing taxes. (p. 6094)"

The processing tax was fixed by the Secretary of Agriculture on the basis of 30 cents per bushel of wheat processed. The processor was charged with payment of the tax. The tax was not imposed upon the manufactured product, nor was the purchaser of the product made responsible for payment of the tax. The amount of indebtedness which the United States claims to be due it in this case of $28,419.20 is computed by multiplying the number of barrels of flour purchased by the factor .00704. This is the factor which the Secretary of Agriculture fixed as applied to floor stocks and the floor stocks on hand when the processing tax was imposed upon wheat as a basic product July 9, 1933. *Treasury Decision 4391-(XII-2 CB 480)*, promulgated September 18, 1933, superceded in some respects by *Treasury Decision 4579-(XIV-2 CB 483)*. The alleged indebtedness computed by the Comptroller General is a mere mathematical conclusion without jurisdiction in fact or at law.

The respondent, as found in the facts by the Court of Claims, obtained an injunction against the Collector of Internal Revenue preventing the collection from it of processing tax for the period from May, 1935 to January 6, 1936. Congress has provided in Title III of the Revenue Act of

1936, that if by the application of the method set forth and approved by Congress it was found that the respondent has escaped any tax as the result of not paying the same to the Collector of Internal Revenue during the injunctive period, then the respondent must pay 80 per cent thereof to the Collector of Internal Revenue. It was within the knowledge of Congress that certain expenses must be borne by the respondent in connection with the administration of these funds. Therefore, as indicated it was the intent of Congress to exempt 20 per cent of this fund from taxation, or such portion thereof as might remain after expenses had been met. It was further the intent of Congress that if the respondent absorbed the tax which it did not pay to the Collector of Internal Revenue during the injunctive period, May 1935 to January 6, 1936, then it should not be required to pay any such tax and certainly the Government would not be entitled to recover from the respondent a tax which was not in the first place passed on to it.

If the respondent and those having like contracts with vendees were legally liable to reimburse the vendees on the basis as here claimed by the respondent, it would prevent the collection of revenue as intended by Congress under Title III of the Revenue Act of 1936, or in case settlements have been made it would open up large fields of litigation by way of claims for refund.

Title VII of the Revenue Act of 1936 was enacted by Congress as a companion to Title III of said Act. Title VII provided a formula for determining whether or not the processors were entitled to a refund of any of the tax illegally collected during the *pre-injunctive* period which was from July 9, 1933, the effective date of the Agricultural Adjustment Act, to the beginning of the injunctive period, which differed in individual cases, but which in this case was May 1, 1935.

Congress intended that the entire matter of the collection of tax escaped, if any, during the period from May 1, 1935 to January 6, 1936, would be taken care of by Title III of the Revenue Act of 1936 and any refund of tax which had

been paid from the effective date of the Agricultural Adjustment Act on wheat processed July 9, 1933 up to the injunctive period in this case, May 1, 1935, if any, would be determined under the provisions of Title VII of the Revenue Act of 1936. It was the intent of Congress that this entire matter be adjusted under Title II and Title VII of the Revenue Act of 1936 and that the same be administered by the Commissioner of Internal Revenue and not by the Comptroller General. It was the intent of Congress, as heretofore indicated, that no tax be escaped on account of the failure to pay to the Collector of Internal Revenue the processing tax during the injunctive period, but it was not the intent of Congress that a tax be collected on escaped processing tax by the Bureau of Internal Revenue and then collected by the Action of the Comptroller General such as has been taken in this case.

The Solicitor General in his application for a writ of certiorari states that certain cases are in litigation, other cases awaiting litigation, and that probably $2,000,000.00 is involved with respect to certain cases in the office of the Comptroller General. However, the Solicitor General does not inform the Court whether or not the Bureau of Internal Revenue has already collected or will collect 80 per cent of the amount involved as intended by Congress, or $1,600,000.00 of the $2,000,000.00 alleged to be involved. Neither has the Solicitor General informed the Court of the litigation which might ultimately result if such adjustments have been made or will be made by the Commissioner of Internal Revenue should this Court grant a writ of certiorari and reverse the opinion of the Court of Claims in this case.

CONCLUSION.

The decision of the Court of Claims is correct and there is no conflict of decisions. It is respectfully submitted, therefore, that the petition for certiorari be denied.

PHIL D. MORELOCK,
Attorney for Respondent.

May, 1941.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 45.

THE UNITED STATES, *Petitioner*,

v.

THE KANSAS FLOUR MILLS CORPORATION, *Respondent*.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR THE RESPONDENT.

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OPINION BELOW.

The opinion of the Court below (R. 9) is reported in 92 Ct. Cls. 390.

JURISDICTION.

The judgment of the Court of Claims was entered January 6, 1941 (R. 10). The petition for a writ of certiorari was filed March 31, 1941 (R. 10) and was granted May 12, 1941 (R. 11). The jurisdiction of this Court rests on Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED.

During the period from May 1935 to January 6, 1936, the respondent sold and delivered flour to various Government agencies under contracts containing a clause which recited that the prices "include any Federal tax heretofore imposed by the Congress," and provided that if any taxes are thereafter "imposed or changed by the Congress," then the contract price will "be increased or decreased accordingly." The Government paid the contract price. The respondent had enjoined the collection of processing taxes on the wheat used to manufacture the flour and was relieved of the payment of said taxes when they were held invalid by the decision of this Court on January 6, 1936.

The Government withheld funds admitted to be owing to the respondent for flour sold and delivered to Government agencies subsequent to January 6, 1936 and applied said funds to an alleged indebtedness of respondent resulting from failure to pay the processing taxes on wheat processed for the period from May 1935 to January 6, 1936. Under these circumstances the following questions are presented:

1. (a) Does the language of the contract construed in accordance with recognized principles require an adjustment of the sales price of the flour sold and delivered during the period from May 1935 to January 6, 1936, because of the invalidity of the processing taxes, even though that condition was not specified in the contract?

(b) Was the enactment of Titles III, IV and VII of the Revenue Act of 1936 a "change by the Congress" contemplated by the contract?

2. Assuming that the language of the contract does not require a price adjustment with respect to the flour sold and delivered to Government agencies during the period from May 1935 to January 6, 1936, does the Government have the right to exact a price adjustment by withholding funds belonging to respondent on equitable grounds where it is not shown:

(a) That there was any mistake by the parties, but only a recognized doubt, as to the validity and collectibility of the processing taxes, or

(b) That any particular part of the burden of the processing taxes was shifted to the Government in the contract price of the flour sold and delivered from May, 1935 to January 6, 1936?

3. May the Government here assert for the first time equitable grounds in support of a claimed set-off where it was not pleaded or considered in the Court of Claims or mentioned in the petition for certiorari?

STATEMENT.

Respondent is a corporation organized and existing under the laws of the State of Delaware with its principal office in Kansas City, Missouri and at all times mentioned herein was engaged in the business of manufacturing flour and related products from wheat for sale to various buyers including the United States. (R. 6) The respondent sold to the United States under contracts dated May 12, June 27, July 31 and December 4, 1936, wheat flour and wheat bran for a total consideration of $23,288.11. (R. 6-7) The flour and bran were delivered and accepted by the United States and vouchers in the amount of $23,288.11 were forwarded to the General Accounting Office for payment. (R. 6-7) The payment of these vouchers was withheld by the Comptroller General and the amount credited by him against an alleged indebtedness of a larger amount on account of alleged overpayments made by the petitioner to the respondent under certain other contracts. (R. 6-7)

The other contracts were entered into and completed during the period from May, 1935 to January 6, 1936, under which the respondent sold to the United States approximately 3,383,000 pounds of flour. The flour was sold to the United States at a composite price, and the tax was not separately invoiced as appears in an excerpt from one of

the contracts between the respondent and the United States typical of the price provision contained in all of the contracts of sale and in all the invoices issued to the United States by the respondent as follows: (R. 7)

Item	Pounds (about)	Unit price (per pound)	Total contract price
Lb. Flour, wheat, in sacks, Type A	78,400	0.0323	$2,532.32

Each of the contracts contained the following provision: (R. 7)

> "Prices set forth herein include any Federal tax heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, processing tax, adjustment charge or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract, and are paid to the Government by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly, and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items."

The respondent delivered the flour under the contracts, the same was accepted by the United States and payment made therefor in accordance with the bid price. (R. 7) Along with other wheat processors the respondent had during the period from May, 1935 to January 6, 1936 applied for and obtained from the United States District Court an injunction prohibiting the Collector of Internal Revenue from the collection of any processing taxes from it during this period. (R. 8)

The Secretary of Agriculture prior to May, 1935 in accordance with authority vested in him by the provisions of the Agricultural Adjustment Act of May 12, 1933 (48 Stat. 31), as amended, had, by Wheat Regulations approved by

the President, established the rate of tax on first domestic processing of wheat at 30 cents per bushel of wheat processed. The conversion factor as applied to floor stocks of flour was fixed at .704 cents per pound. (R. 8)

The petitioner has identified certain contracts entered into between it and the respondent during the period from May, 1935 to January 6, 1936 and by multiplying the total number of pounds of flour provided for by the contracts by the conversion factor applicable to floor stocks, .704 cents per pound, has arrived at an amount of the alleged indebtedness of the respondent to the United States amounting to $28,419.20. (R. 8) The amount for which judgment has been rendered, $23,288.11, which is admitted to be owing to the respondent, had been credited by the Comptroller General against the alleged indebtedness of the respondent to the United States in the amount of $28,419.20. (R. 8-9) On April 20, 1938 a petition was filed in the Court of Claims by the respondent to recover the $23,288.11 owing to it by the United States on account of flour delivered and accepted under contracts subsequent to January 6, 1936. The Government entered a general traverse. (R. 5) The Court of Claims entered judgment in favor of the respondent in the amount of $23,288.11 on January 6, 1941. (R. 10)

SUMMARY OF ARGUMENT.

The Government's case is founded on two erroneous assumptions. In the first place, the Government assumes that both parties to the contract supposed that "respondent was liable for and would pay the processing tax to the United States." (Br. p. 24) On the contrary, during the period from May, 1935 to January 6, 1936, when the contracts were signed and payments made, the parties clearly had in mind the possibility that the processing tax was invalid and that respondent might be relieved of payment, since respondent actually had an injunction against collection of the processing tax during that period. One Circuit Court of Appeals held the tax invalid and this Court granted a tem-

porary injunction against collection during the same period. Moreover, the Comptroller General had considered the possibility of the invalidity of the processing tax in connection with contracts containing similar tax clauses, which he ruled made no provision for price adjustment in the event of a decision of invalidity.

The Government also assumes that the full burden of the processing tax was shifted in the selling prices specified in the contracts. The determination of the extent to which the tax burden was shifted is a very difficult and complex question of economic fact, involving a comparison of actual prices with the prices that would have prevailed in the absence of the tax. No evidence was offered on the subject and it cannot be assumed *a priori* that the selling prices were higher, by the full amount of the tax, than they would have been if there had been no tax.

The provisions in the contracts for price adjustment are clear and specific and do not require any reduction in the prices under the circumstances of this case. The tax clause provides for a price reduction only in the event that taxes of the kind described should be "changed by the Congress." Respondent was relieved from payment of the processing tax by reason of this Court's decision holding the tax invalid, and not as a result of any change by Congress. *United States* v. *Butler*, 297 U. S. 1. The Revenue Act of 1936, enacted more than five months after this Court held that collection of processing taxes should be enjoined, was not such a change by Congress within the meaning of the clause.

There is no unexpressed purpose of the tax clause that would justify a reduction of the contract prices here. It cannot be said that the purpose of the clause was to protect the parties against *all* contingencies affecting margins or prices, in the face of an enumeration of specific contingencies that would call for price adjustment. Compare *United States* v. *Glenn L. Martin Co.*, 308 U. S. 62; *United States* v. *Cowden Mfg. Co.*, 312 U. S. 34. Nor is there any basis for the Government's argument that another purpose of

the clause was "to give the Government the certainty that increased or decreased tax collections would be precisely offset by corresponding price changes." (Govt. Br. p. 6) If there had been ary such purpose it could easily have been expressed.

There is no merit to the Government's argument that a set-off should be allowed on equitable grounds without regard to the tax clause. The relief claimed is based on an alleged mutual mistake of the parties as to the validity of the processing tax. However there was no mistake, but only a recognized doubt as to the validity of the tax, collection of which respondent had enjoined. Equitable relief is not granted in such a case.

Moreover, restitution would in any event be limited to the amount of tax burden shifted, which has not been shown. Respondent would not be unjustly enriched by avoiding that part of the tax burden which it had failed to shift as an economic fact.

The imposition of the unjust enrichment tax would constitute a "change in circumstances" which would preclude the claimed restitution if otherwise allowable. Under Section 501(b) of the Revenue Act of 1936, Respondent would *not* be entitled to an exclusion from income subject to the 80 per cent tax on the basis of a repayment to the Government at this time, if such repayment is based on grounds of equity or quasi-contract,—without regard to the tax clause in the contracts.

With the exception of one case, which is pending here on petition for certiorari, there are no authorities supporting the Government's position. Numerous decisions deny recovery to buyers in similar cases where goods are sold at a composite price. The *Wayne County Produce Co.* case which petitioner cites, points out the distinction between cases like the present and the situation there involved where goods were sold at a named purchase price and the buyer agreed in addition to pay a sales tax which was mistakenly believed to be applicable but which was later refunded.

Petitioner did not assert any equitable ground in the Court of Claims nor in the petition for certiorari. This Court's consideration of the case should therefore be limited to Petitioner's rights on the contracts as written.

ARGUMENT.

I.

PETITIONER'S CASE IS FOUNDED UPON THE ERRONEOUS ASSUMPTIONS THAT (1) THE PARTIES FAILED TO CONTEMPLATE THE INVALIDITY OF THE PROCESSING TAX AND (2) THAT THE FULL BURDEN OF THE TAX WAS SHIFTED IN THE SELLING PRICE.

There are two fallacies running through the Government's argument and forming an essential part of the Government's case. In the interest of clear thinking these fallacies should be exposed before we undertake to answer the Government's argument in detail. The Government's brief assumes:

(1) that the parties to the contracts did not contemplate the possible invalidity of the processing tax, and

(2) that the full burden of the processing tax was shifted by respondent in the selling prices specified in the contracts.

It is submitted that both of these assumptions are without foundation in fact, so that the Government's entire argument based upon these premises is unsound.

(1) There Was No Mutual Mistake, but Only a Recognized Doubt as to the Validity of the Processing Tax.

In the first place, the contracts were entered into "during the period from May, 1935 to January 6, 1936" and during that period Respondent had an injunction "prohibiting the collection from it of any processing taxes". (R. 7, 8.) The question as to the validity of the processing tax had been in litigation for a long time prior to that period

and at least one District Court had passed upon the question as early as October 19, 1934. *Franklin Process Co.* v. *Hoosac Mills*, 8 F. Supp 552 (D. Mass.). A Circuit Court of Appeals had actually held the processing tax invalid on June 13, 1935. *Butler et al.* v. *United States*, 78 F. (2d) 1 (C. C. A. 1). A temporary injunction was granted in this Court on November 25, 1935. *Rickert Rice Mills, Inc.* v. *Fontenot*, 296 U. S. 569, 297 U. S. 110. Under these circumstances, there is no basis for the Government's argument that the parties did not contemplate the possible invalidity of the tax "during the period from May, 1935 to January 6, 1936" when the various contracts were signed.

Moreover, in the summer and fall of 1935 the Comptroller General had given consideration to the possibility of a judicial determination of invalidity, in passing on and approving contracts similar to those involved here, where the tax clauses were modified by bidders. In a decision rendered September 12, 1935, particular reference was made to the fact that "the legality of such (processing) taxes is now in the Courts", but the Comptroller General said this with reference to the possibility of judicial determination of invalidity:

> "Such a determination by the Courts would not constitute a change in the tax 'by the Congress', as contemplated in the formal invitation for bids, but a judicial determination that a tax theretofore imposed is not legal." A-64860, 15 Dec. Compt. Genl. 201.

Another decision to the same effect was rendered on November 4, 1935, A-66872, 15 Dec. Compt. Gen. 367. The clause there considered was expressly stated to be the clause in Government Standard Form No. 33, Short Form Contract, which is substantially identical with the clause used in the contracts in this case.[1]

Not only was the possible invalidity of the processing tax contemplated by the parties, but the administrative officers

[1] See Code of Federal Regulations, Title 41, Sec. 12.33.

of the Government definitely considered this possibility with particular reference to the tax clause in the Government Standard Form No. 33, which was held not to require any price adjustment on the basis of a judicial determination of invalidity. The basic assumption made throughout the Government's brief is therefore utterly unfounded.

(2) It Cannot Be Assumed a Priori that the Full Tax Burden Was Shifted.

In the second place, there is no basis in the facts of this case for the assumption made by the Government that the full burden of the processing tax was shifted by Respondent in the selling price specified in the contracts. It may be admitted that the existence of the processing tax had some probable effect on the market price for flour fixed in open competition. Some part of the tax burden might have been shifted by processors, and by respondent in particular, in the sense that their selling prices were higher because of the tax than they would have been if the tax had not been imposed.[2] However, there is no basis for assuming, without proof, that the whole or any particular part of the tax burden was thus shifted.[3] It will be shown later that the Government's claim for equitable relief, if otherwise

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[2] See the introduction to Seligman, "*The Shifting & Incidence of Taxation*" (5th ed. 1926); Carver, "*Principles of National Economy*" (1921), p. 630; Shultz, "*American Public Finance & Taxation*" (1932), p. 277; Buehler, "*Public Finance*", 2nd ed. 1940, pp. 344 et seq.; Hunter, "*Outlines of Public Finance*" (1936), pp. 154 et seq.; Brown, "*The Economics of Taxation*" (1924), pp. 9-13, 56 et seq.; Lutz, "*Public Finance*" (3 ed. 1936), pp. 381, et seq. See also Ferger, "*Windfall Tax and Processing Tax Refund Provisions* of the 1936 Revenue Act"; XXVII The American Economic Review, 45, 52; "*An Analysis of the Effects of the Processing Taxes Levied Under the Agricultural Adjustment Act*", prepared in the Bureau of Agricultural Economics (Govt. Print. Of. 1937) p. 1.

[3] One District Court found as a fact that the flour market was "demoralized" after May 1, 1935, as a result of attacks on the constitutionality of the Agricultural Adjustment Act, and that the processing tax applicable to flour sold after that date was "wholly absorbed" by the processor. *Johnson* v. *Scott County Milling Co.*, 21 F. Supp. 847, 849 (E. D. Mo.).

sound, must be limited to such part of the purchase price as represents the extent to which the economic burden of the processing tax was shifted to it.[4]

In the case of *Indian Motorcycle Co.* v. *United States*, 283 U. S. 570, 581, Mr. Justice Stone, dissenting, pointed out that no assumption can be made *a priori* that any particular tax at any particular time is passed on. Although this view was expressed in a dissenting opinion, the decision of the majority has since been discredited. Cf. *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 170-171. However, even the majority in the *Indian Motorcycle Co.* case would hardly question Mr. Justice Stone's ideas in the case of a processing or manufacturing tax, as distinguished from the sales tax there involved. Cf. *Wheeler Lumber, Bridge & Supply Co.* v. *United States*, 281 U. S. 572; *Liggett & Myers Tobacco Co.* v. *United States*, 299 U. S. 383.

In any event, it is submitted that Mr. Justice Stone was absolutely correct when he made the following statement with reference to the assumption that the burden of a sales tax is inevitably passed on to the buyer:

> "With this assumption economists would not, I believe, generally agree. Many hold that whether the burden of any tax paid by the seller is actually passed on to the buyer depends upon considerations so various and complex as to preclude the assumption *a priori* that any particular tax at any particular time is passed on. In some conditions of the market, the burden remains with the seller, or even may be shifted back from the seller to the producer by the reduction of the producer's price rather than forward to the consumer by an increase of the seller's price."

It is true that the contracts in the present case recite that the contract prices "include any Federal tax heretofore imposed by the Congress". It is submitted, however, that such

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[4] The Government argues (Br. p. 24) that "Had the parties known that respondent was not liable for and would not pay the tax, the contract price would have been reduced accordingly." The assumption is that the price would have been lower by the full amount of the tax, an assumption without foundation.

an expression is no real evidence that the whole or any part of the economic burden of the tax was being shifted in the named prices. Goods are frequently sold at a price "including tax" in the sense that no further charge is to be made against the buyer on account of the tax. Such a provision may be particularly important in situations where taxes sometimes are, or have been, billed separately as an addition to a stated selling price. That was true in the case of goods produced from commodities subject to the processing tax during the early part of the tax period. Section 18 of the Agricultural Adjustment Act, 48 Stat. 31, 41, provided that where articles produced from a taxable commodity were delivered after the effective date of the processing tax under contracts of sale entered into before the date, the seller might add the amount of the tax to the invoice as a separate item to be collected from the buyer. Cf. *United States* v. *Cowden Mfg. Co.*, 312 U. S. 34, 35-36. In the case of contracts entered into later, a stipulation that the processing tax was included in the price gave the buyer assurance that there would be no additional charge on account of the tax. It is submitted that the recital in the contracts here was intended simply to furnish such a clarification.

It would be fantastic to suppose that the parties intended by the contract recital to express the opinion that the economic burden of the tax was being shifted in full in the contract prices. The parties would hardly have undertaken to express an opinion in the contract as to the extent to which the existence of the processing tax affected the market price for flour arrived at in open competition. The question as to the extent to which the processing tax was shifted in such selling prices must be recognized as a very complicated and difficult question of economic fact, involving a comparison between the actual prices, and the prices that would have prevailed in the absence of the tax.[5]

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[5] The Congressional Committees which reported Title VII of the Revenue Act of 1936, limiting refunds of processing taxes to the extent to which the claimants bore the burden of such taxes, said: "The question as to whether processing taxes were passed on • • •

The Government relies (Br. p. 27) on the recent decision of *United States* v. *American Packing & Provision Co.*, 122 F. (2d) 445 (C. C. A. 10th), pending in this Court on petition for certiorari, No. 735. In the Circuit Court of Appeals equitable relief was granted to the Government in a situation similar to that involved here. The Court in that case considered that the contract recital that prices "include any Federal tax" justified an inference that the tax burden had been shifted in the contract prices. However, the court did not indicate that it had any clear concept of tax shifting, and it is submitted that the decision is unsound. Contracts for the sale of hog products were involved there, and Government economists have published their finding that no appreciable part of the processing tax on hogs was reflected in the market price for hog products. See "*An Analysis of the Effects of the Processing Taxes Levied Under the Agricultural Adjustment Act*", prepared by the Bureau of Agricultural Economics and published by the Bureau of Internal Revenue (Govt. Print. Of. 1937). On page 9 of that report it is said:

> "Since the aggregate retail value of hog products consumed apparently was not changed by the tax, and the volume of hog products consumed was not materially affected, it follows that the retail prices of hog products were little, if any, higher with the tax than they would have been without the tax. * * * In other

involves extremely complicated economic and accounting considerations." *Senate Report No. 2156*, 74th Cong. 2nd Sess. p. 33; *House Report No. 2818*, 74th Cong. 2nd Sess., p. 2.

The Government contended in this Court in the *Anniston* case that the extent of tax absorption could be determined by "fair and reasonable approximations", but recognized that "the accounting and economic problems in some cases will be complex and difficult". *Anniston Mfg. Co.* v. *Davis*, October Term, 1936, No. 667 (Govt. Br. pp. 162-163).

The Bureau of Agricultural Economics has recognized that the determination of the incidence of processing taxes "involves some of the most complex considerations in the field of economics". *Analysis of the Effects of the Processing Taxes Levied under the Agricultural Adjustment Act* (Govt. Print. Of. 1937), p. 4. See also Ferger, *op. cit. supra*, Note 2, at pages 52-53.

words, if there had been no processing tax, the retail price of hog products would have been no different from what it actually was in both years when the tax was in effect."

Even if the recital that the prices include tax should be held to constitute *some* evidence of a complete shifting of the economic burden of the tax, which we deny, the Court of Claims has made no finding of the ultimate fact. The question as to the extent of shift is material to the ground which the Government asserts in this Court for the first time, based upon broad equitable considerations apart from the contract language. Since that ground was not asserted in the Court of Claims, it was not material for the parties to offer evidence on the extent to which the burden was shifted. It will be pointed out more at length later in this brief that the so-called equitable ground which the Government asserts cannot be sustained without a showing as to the extent to which the burden of the tax was shifted in the contract prices. It is submitted that there is certainly no basis for assuming in this case that the full amount of the burden of the tax was shifted in the contract price.

II.

THERE WAS NO CHANGE MADE BY THE CONGRESS OR OTHERWISE IN THE PROCESSING TAXES WITHIN THE LANGUAGE OR PURPOSE OF THE TAX CLAUSE.

Under the clear and express provisions of the tax clauses in the contracts, a reduction of the stated price is required only where the processing tax, or other imposition there described, is "changed by the Congress". (R. 7.) It is submitted that there was no such change in the processing tax within the meaning of the tax clause. Neither the invalidity of the processing tax, nor the judicial determination of invalidity, nor the alleged congressional recognition of invalidity, justifies any price reduction under the terms of the contracts.

(1) The Tax Clause Does Not Warrant a Price Reduction Based on Invalidity or Judicial Determination of Invalidity of Processing Taxes.

This Court held the Agricultural Adjustment Act unconstitutional and the processing tax invalid in *United States* v. *Butler, supra*, on January 6, 1936; and in *Rickert Rice Mills, Inc.* v. *Fontenot, supra*, decided on January 13, 1936, it was held that collection should be enjoined and the amounts impounded should be returned to the processors. Under these two decisions the processing taxes were never a legal liability and never were legally collectible. Judicial determination of invalidity was certainly not a change by Congress within the meaning of the tax clause.

The parties *could* have, but *did not* provide for a price adjustment on the basis of the invalidity, or the judicial determination of the invalidity, of the processing tax. If the parties had intended to provide for a price adjustment upon the basis of such a contingency, there would have been no difficulty in choosing apt words to express such an intent. For example, some sellers of articles produced from taxable commodities expressly stipulated in their contracts for price adjustments under certain circumstances in the event that this Court should determine that the processing taxes were invalid. See, for example, the contract involved in *Casey Jones Inc.* v. *Texas Textile Mills, Inc.*, 87 F. (2d) 454, 455, note 1 (C. C. A. 5th).

The possibility of a decision of invalidity was certainly in the minds of the parties, as we have demonstrated under proposition I, *supra*, where reference was made to the fact that during the period when these contracts were being entered into respondent had actually obtained an injunction against the collection of the processing taxes, and the Comptroller General had given consideration to the possibility with particular reference to contracts of the kind involved here. Moreover, we pointed out that one Circuit Court of Appeals had actually held the processing tax invalid, and that this court granted a temporary injunction against the

collection of processing taxes during the period in which these contracts were being signed, and yet, none of these contracts contained any provision that a decision of this Court holding the processing taxes invalid would be one of the conditions requiring price adjustment. There is, therefore, no possible basis for construing the language of the contracts as requiring a price reduction on the ground of invalidity or judicial determination of invalidity.

Even the court which held for the Government on equitable grounds in a similar situation, recognized that the tax clause itself did not justify a price reduction under the circumstances. See *United States* v. *American Packing & Provision Co., supra.*[6] A similar construction was given to the identical tax clause in *United States* v. *Hagan & Cushing Co.*, 115 F. (2d) 849 (C. C. A. 9th), and in *Ismert-Hincke Milling Co.* v. *United States*, 90 Ct. Cls. 27. The Government's brief here (p. 29) refers to a number of cases, involving similar, but not identical, clauses in contracts between private parties, in all of which cases the clauses contemplating price reductions to offset tax decreases are construed as not warranting recovery by the vendee after this Court's decision in the *Butler* case.[7] It is true that some of those cases involve other obstacles to the buyer's recovery,

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[6] That Court said: "There is nothing in the contract which has reference to the unconstitutionality of the tax or the annulment of the tax. The so-called 'up and down' or the 'increase and decrease' clauses have no relevancy to the unconstitutionality of the tax. It may be conceded that if the right of the Government to recover is dependent upon the contracts between the parties, it must fail." 122 F. (2d) at 449.

[7] *Moundridge Milling Co.* v. *Cream of Wheat Corp.*, 105 F. (2d) 366 (C. C. A. 10); *Consolidated Flour Mills* v. *Ph. Orth Co.*, 114 F. (2d) 898 (C. C. A. 7); *City Baking Co.* v. *Cascade Milling & Elevator Co.*, 24 F. Supp. 950 (D. Mont.); *G. S. Johnson Co.* v. *N. Sauer Milling Co.*, 148 Kan. 861; *Sparks Milling Co.* v. *Powell*, 283 Ky. 669; *Crete Mills* v. *Smith Baking Co.*, 136 Neb. 448; *Johnson* v. *Igleheart Bros.*, 95 F. (2d) 4 (C. C. A. 7), certiorari denied, 304 U. S. 585; *Noll Co.* v. *Sparks Milling Co.*, 304 Ill. App. 624; and *Southern Biscuit Co.* v. *Lloyd*, 174 Va. 299. See also *United States* v. *American Packing and Provision Co.*, 122 F. (2d) 445, 449 (C. C. A-10).

but they all recognize that where tax clauses make no reference to a decision of invalidity, they cannot be construed as requiring price reduction on the basis of such a contingency.

(2) The Revenue Act of 1936 Did Not Constitute a Change by Congress of the Processing Taxes, Within the Meaning of the Tax Clause.

The Government's brief refers to the *Butler* decision on January 6, 1936, holding the processing tax unconstitutional and the *Rickert Rice Mills* decision on January 13, 1936, upholding injunctions against the collection of processing taxes, and then urges that "Congress thereafter (in the Revenue Act of 1936 approved June 22, 1936) both recognized and participated in the elimination of the tax liability". We might concede for the sake of argument that Congress at that time recognized the invalidity of the processing tax but it is ridiculous to say that Congress "participated in the elimination of the tax liability". Although an unconstitutional statute may have some factual consequences (Cf. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371), it cannot be said in the face of the *Butler* decision that the Agricultural Adjustment Act created any tax liability, *Norton* v. *Shelby County*, 118 U. S. 425; *Hopkins* v. *Clemson College*, 221 U. S. 636. After the decisions of this Court in the *Butler* and the *Rickert* cases, Congress could do nothing toward eliminating the tax liability.[8] There is no basis for suggesting that respondent's failure to pay the processing taxes with respect to the flour sold to the Government was due in any way to changes made by Congress. There were some factual consequences of the unconstitutional Agricultural Adjustment Act which furnish the basis for the imposition by Congress of the new

[8] In the petition for certiorari here the Solicitor General made no claim that Congress "participated" in the termination of liability, but contended merely that the Revenue Act of 1936 constituted a congressional recognition of the termination of the processing tax program.

liability for unjust enrichment tax under Title III of the Revenue Act of 1936. However, factually, realistically and practically, Congress contributed nothing to the termination of the processing taxes or to the relief of respondent from paying them. There was therefore no change by Congress within the meaning of these contracts.

As a matter of fact, Title III of the Revenue Act of 1936 makes no mention of processing taxes as such or the Agricultural Adjustment Act. It is applicable generally to cases where any "Federal excise tax was imposed . . . but not paid." Internal Revenue Code, Sections 700-706. It is not limited to cases of invalid or unconstitutional excises—the reason for nonpayment is not material. Title III, therefore, is not even a recognition by Congress of the termination of processing taxes or their invalidity.

Titles IV and VII of the Revenue Act of 1936, to which the Government's brief also refers, cannot constitute any change by Congress in the processing taxes "applicable directly upon the production" of the flour delivered to the Government, within the meaning of the tax clause. As the Government's brief points out, Title IV relates to floor stocks, export and charitable refunds and therefore could have no possible bearing on the processing taxes applicable to the flour here involved. Indeed, the floor stocks provision of 602(a) mentioned by the Government (Br. p. 13), is not available to processors but only to persons who were not liable for the tax.

Title VII relates only to processing taxes that were actually paid to the Government. Even as to such collections, there is no admission in Title VII that the taxes were invalid. Restrictions are there imposed on refunds that might be allowable without regard to the ground of invalidity. That Title would apply to overpayments of processing taxes, even if the Agricultural Adjustment Act were constitutional. Title VII is similar in this connection to Section 3443(d) of the Internal Revenue Code, relating to refunds of other excise taxes.

It is submitted, therefore, that there is nothing in the Revenue Act of 1936 which would constitute a change by Congress within the meaning of the contracts.

(3) There is no Broad Unexpressed Purpose of the Tax Clause that Would Justify a Reduction of the Contract Price.

Clauses similar to those involved in the present case have been construed literally and narrowly by this Court in two cases decided in favor of the Government. *United States* v. *Glenn L. Martin Co.*, 308 U. S. 62; *United States* v. *Cowden Mfg. Co.*, 312 U. S. 34. In both of those cases the Government urged that the clauses should be construed literally so as to deny price increases to the contractor on the basis of new tax burdens that affected the contractor's margin of profit adversely. In urging in the present case that a reduction in the contract price is justified under similar clauses on account of the invalidity of the processing tax, which was not at all unanticipated, the Government argues (Br. p. 6) that "the obvious purpose of the tax clause was to insure to the contractor a stable margin of profit". The clauses were certainly not intended by the parties, to insure a fixed margin of profit, or any profit at all. The clauses in these contracts did not purport to protect either party against *all* contingencies affecting margins or prices, any more than the identical clauses in the *Cowden* and *Martin* cases. The seller was not expected to be protected from sudden and unanticipated increases in wages or other costs, and the buyer was not to be protected against a sudden drop in the price of the raw commodity which would have cheapened the supplies covered by the contract. If there had been any intention to insure to the contractor a stable margin of profit that intention could easily have been expressed in the contract. As the Government argued in the *Glenn L. Martin Co. case*, "the parties could have agreed to do business on a cost-plus basis, but they did not see fit to do so. Cf.

Cramp and Sons Ship Co. v. *U. S.*, 72 Ct. Cl. 146". Government brief pp. 10-11 in *United States* v. *The Glenn L. Martin Co.*, October Term 1939, No. 30. See also Government brief pp. 9-10 in *United States* v. *Cowden Mfg. Co.*, October Term 1940, No. 188.

The truth of the matter is that the clauses in all of these cases were designed to protect the seller and buyer against certain contingencies which were specifically enumerated. Thus, the clause provided for a price increase if a new tax, of the kind described, should be "imposed" by Congress. It also provided for an increase or decrease in price upon the basis of a change in the rate of processing taxes pursuant to the Act of Congress. The Agricultural Adjustment Act contemplated and expressly provided for changes in the rate of processing tax at intervals, depending upon the relationship between the farm price of a taxed commodity and its fair exchange value, as defined in the Act. See Section 9, Agricultural Adjustment Act of 1933 (48 Stat. 31, 33-34).[9] These are contingencies covered by the tax clause. The language of the clause, however, is specific and there is absolutely no basis for reading into the contracts an unexpressed intention to cover some other kind of contingency affecting prices.

The same thing is true of the other unexpressed purpose which the Government argues (Br. p. 6) was behind the tax clause, namely, "to give the Government the certainty that increased or decreased tax collections would be precisely offset by corresponding price changes".[10] If that had been

[9] Actually there was no change in the rate of processing tax on wheat, but changes were made under the Act with reference to other commodities. *Cf. T. D. 4518*, XIV-1 C. B. 450; *T. D. 4495*, XIII-2 C. B. 515.

[10] In the *Cowden Manufacturing Company* case, the Government did not argue that an identical tax clause had any such purpose. There the Government actuallly collected the processing tax, which was imposed after the contract was signed and which was separately billed to the contractor. There was no suggestion in the Government's argument in that case, or in this Court's opinion, that the increase in tax collections was to be offset by a corresponding price change.

a purpose of the contracts it could easily have been expressed. There would have been no difficulty in providing that the selling price should be reduced in a certain amount if the contractor should avoid the payment of the processing taxes. As we have pointed out, the possible invalidity of the processing tax was clearly in the minds of the parties, and the Comptroller General had actually ruled that such a contingency was not provided against in the tax clause of the Government Standard Form of Contract. Where the contracts were thus noticeably silent on the invalidity of the processing tax or the avoidance of payment by the contractor, the courts cannot read into the contracts an unexpressed intention to adjust prices on the basis of such contingencies.

III.

THE GOVERNMENT IS NOT ENTITLED TO RECOVER ON EQUITABLE GROUNDS WITHOUT REGARD TO THE LANGUAGE OF THE TAX CLAUSE.

In the Government's brief on the merits here, the contention is raised for the first time that, without regard to the tax clause, the United States can recover on grounds of equity or quasi-contract. Although we show later that the Court should give no consideration to such a ground, since it was not raised in the court below nor in the petition for certiorari, we will establish that there is absolutely no merit in the Government's contention.

(1) Equitable Relief is Not Granted on Account of a Recognized Doubt.

The Government's so-called equitable ground is based upon an alleged "mutual mistake of the parties". The Government contends (Br. p. 24) that "it was supposed by both parties that Respondent was liable for and would pay the processing tax to the United States". That contention is the core of the Government's case and it is utterly without foundation in fact. Not only is there no evidence of such a

mistake, but we have shown that the parties very definitely had in mind the possibility that the processing tax might be held invalid and might never have to be paid. Under these circumstances, there is no basis for equitable relief on the ground of mistake. Williston, "*Contracts*" (Rev. ed.) Sec. 1543; Pomeroy, "*Equity Jurisprudence*" (4th ed.) Sec. 855; American Law Institute Restatement, "*Contracts*", Sec. 502, comment f; "*Restitution*", Sec. 10(1), comment a, and Sec. 11(1).

The established principle, and the common sense view, is thus stated in comment f, under Section 502 of the Restatement on Contracts:

> "Where the parties know that there is doubt in regard to a certain matter and contract on that assumption, the contract is not rendered voidable because one is disappointed in the hope that the facts accord with his wishes. The risk of the existence of the doubtful fact is then assumed as one of the elements of the bargain."

It may be that the Government was confident that it would win the *Butler* case, and it no doubt was disappointed at the outcome. There must have been some doubts on the part of the Government as to the decision which the Supreme Court would render on the question as to the validity of the processing tax. In comment a, under Section 10(1) of the Restatement on Restitution, it is said:

> "Even slight doubt as to the existence of the subject matter of a contract will prevent restitution, since it may be assumed that the provisions of the contract were inserted with such doubt in mind, and that if the transferor had intended the contract to be conditional, he would have so specified."

The fact that respondent actually had an injunction against the collection of the processing tax during the period when the contracts were signed is conclusive evidence that the parties recognized the possibility that respondent might not pay the tax to the United States. The Govern-

ment's case for recovery "without regard to the tax clause" must therefore fall in the absence of a mistake that would give rise to equitable relief.

(2) Restitution in Any Event Would Be Limited to the Amount of Tax Burden Shifted, Which Has Not Been Shown.

However, even if there had been an actionable mistake, the Government has failed to show the extent to which respondent might have been benefited or the Government hurt by it. The recovery of a payment made on the ground of mistake is based essentially on the theory that one party "has been unjustly enriched at the expense of another". American Law Institute, Restatement, "*Restitution*," Sec. 1. The extent of respondent's enrichment resulting from its avoidance of the payment of the tax could not exceed the portion of the tax burden shifted to the Government in the stated contract price. To the extent that respondent failed to shift some part of the tax burden, respondent received no benefit or enrichment from its failure to pay that part of the tax to the Government. We have already shown that it cannot be assumed *a priori*, or under the facts of this case, that the full economic burden of the processing tax was shifted to the Government in the contract prices.[11] Even if there had been a mistake,—if the parties had assumed that there was no question as to the validity of the tax and the inevitability of its payment—the Government should be denied recovery in the absence of a showing as to the extent to which it was hurt or the respondent was benefited through a shifting of the burden in the contract prices.

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[11] Even to the extent that some part of the tax burden was shifted in the contract prices, it cannot be said that the benefit to respondent from non-payment of the tax was an *unjust* enrichment since, as we have shown, the possibility of avoidance of the tax was in the minds of the parties when they contracted. It is only reasonable to conclude that the tax had a lesser effect on the market prices of flour than it would have had if payment of the tax had been considered inevitable.

It may be pointed out that the amount of set-off claimed by the Government "was arrived at by applying the conversion factor of .704 cents per pound to the total amount of flour" delivered under the contracts. (Govt. Br. p. 3.) The processing tax, of course, was not imposed on the flour, but upon the processing of wheat, and at the rate of 30 cents per bushel of wheat. The factor of .704 cents was determined by the Secretary of Agriculture and the Treasury Department as being the rate applicable to a pound of flour, for purposes of the floor stock and compensating taxes, and for computing refunds under certain exemption provisions of the Agricultural Adjustment Act. *T. D. 4391*, XII-2 C. B. 480; *T. D. 4579*, XIV-2 C. B. 483, 487. The rate of .704 cents per pound of flour is computed by assuming an average yield of one barrel of flour (196 pounds) from 4.6 bushels of wheat (60 pounds per bushel, or a total of 276 pounds). The difference in weight between the flour and the wheat, namely, 80 pounds (276—196), is accounted for by the by-products, bran or middlings. However, the full amount of tax on the 4.6 bushels of wheat, namely, $1.38 (4.6 bu.×$.30) was attributed by the Secretary of Agriculture to the flour in order to arrive at the rate of .704 cents per pound of flour ($1.38 : 196 pounds); and none of the tax was apportioned to the bran or middlings, as the Treasury decisions cited above clearly show.

It appears therefore that the set-off claimed by the Government is based upon the assumption that the full amount of tax on wheat was shifted in the sale of flour. Even if it could be assumed that respondent, and millers generally, shifted the full burden of the tax, it could not be reasonably assumed that the full amount of the tax burden was shifted in the sale of flour and no part of it in the sale of bran or middlings.

The objection to the measure of recovery claimed by the Government is, however, much more fundamental and serious than that it fails to reflect the amount of tax on that part of the wheat that went into the flour delivered under the contracts. It is true that all of the taxable wheat did

not go into the flour, but some went into bran and middlings. Moreover, the Government has failed to show by proper evidence the quantity of wheat required by respondent to produce the quantity of flour delivered. But the fundamental and fatal objection to the amount of set-off claimed is that the Government has failed to show the extent to which the economic burden of the tax was shifted in the contract prices. What effect did the processing tax have on the market price of flour, the price fixed in open competition, at the times when the contracts were signed? To what extent were the selling prices higher than they would have been if there had been no tax? These questions would have to be answered, at least by reasonable estimates or approximations, on the basis of proper evidence, before the court could ascertain the extent to which respondent had shifted the tax burden, or the extent to which the Government had been hurt and respondent benefited. The Government offered absolutely no evidence on this subject and the Court of Claims made no finding of the ultimate fact as to the extent of shift. It is submitted therefore that the Government has not established a measure of recovery based on "unjust enrichment." The Government's case should fail for this reason even if the contracts or payments had been made under such mistake as would give rise to equitable relief.

(3) The Imposition of the Unjust Enrichment Tax Would Constitute a "Change in Circumstances" Which Would Preclude the Claimed Restitution if Otherwise Allowable.

Another infirmity in the Government's case for equitable relief may be found in the application to respondent of the unjust enrichment tax provisions of Title III of the Revenue Act of 1936. Section 501(a) of that Act imposes on respondent a tax at the rate of 80 per cent on "that portion of the net income from the sale" of the flour "which is attributable to shifting to others to any extent the burden of" the unpaid processing tax. [I.R.C.,

Sec. 700(a)]. The Government's brief (pp. 18-19) refers to these provisions, but urges that under Section 501(b) [I.R.C., Sec. 700(b)], respondent "would not be subject to the unjust enrichment tax on these transactions," "if it should be required to reduce its sales price by the amount of its unpaid processing taxes." This contention might be sound if the price reduction were made pursuant to the sales contracts themselves, and the Government made the contention only in the course of its argument that the tax clause in the contracts requires the adjustment. The contention would be unsound with reference to a repayment ordered on equitable grounds "without regard to the tax clause."

As the Government brief (p. 18) points out, Section 501(b) excludes from taxable income the net income from sales with respect to which the taxpayer made a "tax adjustment" with his vendee, and Section 501(j)(4) [I.R.C. Sec. 700(j)(4)] defines "tax adjustment" as a repayment "made on or before June 1, 1936, or thereafter in the *bona fide* settlement of a written agreement entered into on or before March 3, 1936." It is clear therefore that respondent would not be entitled to an exclusion, under Section 501(b), on account of a price reduction made after June 1, 1936, unless such reduction in price were made pursuant to a written agreement. If respondent is required to make repayment to the Government on equitable grounds, "without regard to the tax clause," the repayment will not justify an exclusion from income subject to the 80 per cent tax.

Even if the Government were otherwise entitled to restitution, the imposition by Congress of the unjust enrichment tax would constitute such a change in circumstances as would preclude recovery on equitable grounds. "*Restatement on Restitution*," American Law Institute, Secs. 69, 142. In Title III of the Revenue Act of 1936, Congress enacted a comprehensive plan for dealing with any possible unjust enrichment resulting from the invalidity of the processing tax. That title is applicable to sales of tax avoided goods, whether the sales were made to individual buyers or to the

Government. The gross inequity of the Government's claim here is emphasized by its dual role as buyer and as collector of the 80 per cent tax under Title III.

IV.

WITH THE EXCEPTION OF ONE DECISION, THE AUTHORITIES DO NOT SUPPORT PETITIONER'S CONTENTION.

With the exception of *United States* v. *American Packing & Provision Co., supra,* none of the cases cited by petitioner supports its position. The Government cites a number of cases on the subject of equitable relief based on mistake of law, with particular reference to suits by the Government. The cases have no bearing on the controversy, since we concede that money paid out by public officials may be recovered when payments are based on mistake of law as well as of fact. The point is that there was no mistaken of law or fact here. Not only has the Government failed to establish that there was any mistake, but it appears affirmatively that the parties recognized the possibility that the processing tax would be held invalid. There was no mistake, but only a recognized doubt as to respondent's liability for the tax, and as we have demonstrated there is no basis for equitable relief in such a case.

The case of *Wayne County Produce Co.* v. *Duffy-Mott Co.*, 244 N. Y. 351, cited by petitioner, involved a sale of cider at an agreed price of "14½ cents per gallon, subject to a stated discount, plus the manufacturer's war tax of 10 per cent which was to be paid in full without discount." The seller, "after collecting the amount of the tax from the plaintiff" (buyer), paid it to the Federal Government. It was later held by the courts in other cases that the tax was not applicable to cider, and the seller in the *Wayne County* case obtained a refund from the Government. The Court of Appeals held that the buyer could recover the amount of refund from the seller. Chief Judge Cardozo, writing the opinion of the court, based the relief on a mutual mistake of the parties and said:

> "The distinction is unimportant, at least for present purposes, between mistakes of fact and those of law. The quality of the mistake did not prevent the defendant from recovering the money from the Government. It cannot absolve from the duty of disposing of the money thus recovered as good conscience shall dictate."

There was no question in that case as to the existence of the mistake. It did not appear that there was any doubt as to the seller's liability for the tax when the contracts were signed and payment made. The court points out:

> "The Treasury Department and manufacturers generally had misconstrued an Act of Congress whereby a tax of 10% was levied upon sales of unfermented grape-juice and 'other soft drinks'."

The Chief Judge expressly distinguished the case before him, where the buyer agreed "to pay a stated price, and to put the seller in funds for the payment of the tax besides," from cases like the present, where the goods are sold at a composite price. He said:

> "This is not a case where the item of the tax is absorbed in a total or composite price to be paid at all events. In such a case the buyer is without remedy, though the annulment of the tax may increase the profit to the seller. *Moore* v. *Des Arts*, 1 N. Y. 359. This is a case where the promise of the buyer is to pay a stated price, and to put the seller in funds for the payment of a tax besides. In such a case the failure of the tax reduces to an equivalent extent the obligation of the promise. The form of the transaction was not thoughtless or accidental. It was deliberate and purposed. The end to be served is conceded in the brief of counsel. If a sum equal to 10% of the quoted price per gallon had been added to the price as something to be paid at all events, a tax would have been due upon the sum so added as well as upon the residue. The form was adopted whereby the manufacturer was in a position to account to the Government at a quoted rate per gallon, and to pay the tax with the excess. The defendant had the benefit of the transaction as thus molded in its dealings with the Government."

The case of *Moore* v. *DesArts*, which Chief Judge Cardozo cites with approval and distinguishes, involved a sale by an importer of goods on which the importer had paid a definite sum to the Collector for duties. The goods were sold by the importer at the "long price," so that under the usage and custom in the trade the buyer would be entitled to the drawback in the event that he should export the goods. Thereafter, the Secretary of the Treasury decided that the goods were free from duty, and the amount of duties collected was refunded to the seller. The buyer sought to recover the amount of refund from the seller. The court pointed out that the Government officers had decided both ways on the question whether the goods were subject to duty and said that "it may fairly be presumed that these merchants knew that was a debatable question; they knew that the decision made by the Collector might be overruled by the Secretary of the Treasury and the duties be refunded to the importer." On these facts the court denied recovery.

The court recognized that the agreed purchase price was subject to adjustment in some circumstances, namely, in the event of a drawback on export of the goods, but it was pointed out that there was no such drawback and that the agreement of the parties did not provide for a price reduction upon the basis of any other contingency.

A similar situation is involved in the present case. Here there was a debatable question whether the processing taxes were valid and the parties knew that there was a chance that this Court would relieve the contractor from the payment of the tax. The contract in the present case provided for an adjustment in price upon certain contingencies specifically set forth, and by like reasoning a reduction in price should be denied upon the basis of the invalidity of the tax which was not covered by the tax clause. The situation both in the present case and in *Moore* v. *DesArts* is therefore clearly distinguishable from the *Wayne County Produce case*, where the parties had misconstrued the tax act and there was no intimation that they had any doubt as to the applicability of the tax to the goods in question.

V.

PETITIONER'S CLAIM FOR EQUITABLE RELIEF, APART FROM THE CONTRACT, WAS NOT ASSERTED IN THE COURT OF CLAIMS NOR IN THE PETITION FOR CERTIORARI AND SHOULD RECEIVE NO CONSIDERATION HERE.

The Government argues here that it is entitled to recover on the ground of mutual mistake, "without regard to the tax clause" (Br. pp. 24-27), and "even if the tax clause were wholly ignored." (Br. p. 7.) This claim for equitable relief, or quasi-contractual recovery, based on an alleged mutual mistake, is raised by the Government in its brief on the merits here. It was not mentioned in the petition for certiorari[12] and was neither asserted nor considered in the Court of Claims. The only question raised or argued in the Court of Claims was whether the Government was entitled to a price adjustment under the terms of the tax clause in the written contracts. The Government's brief in the Court of Claims states the "question presented" thus:

> "*Whether under the eight contracts* entered into by the plaintiff and defendant during the period that the Agricultural Adjustment Act was in force, plaintiff has been overpaid by defendant in the amounts of the processing taxes on the supplies sold thereunder and included in the contract prices, by reason of the fact plaintiff did not pay such processing taxes." (Italics supplied.)

If the Government had relied on the equitable ground in the Court below, it would have been required to plead its defense affirmatively[13] and the burden of proof would have

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[12] The petition for certiorari herein was filed before the Circuit Court of Appeals for the Tenth Circuit decided the one case that supports petitioner's present theory of equitable relief. See *United States* v. *American Packing & Provision Co.*, *supra*. The Court in that case, however, was careful to point out that the Government had pleaded an "equitable set-off," which was not the case here. 122 F. (2) at 449.

[13] Court of Claims Rule 21.

been on it. *Jones* v. *United States*, 39 Fed. 410, 412. The Government would have to establish by evidence, (1) the existence of the alleged mutual mistake, and (2) the extent to which it was damaged thereby. This last element would have involved a showing of the probable price at which the parties would have contracted, if at the time it had been known with certainty that the processing tax was invalid and would not have to be paid. Of course, no evidence on the subject was offered and the Court of Claims made no finding of the facts essential to a recovery on the ground of mistake. If the Government had raised the point and offered some evidence in support of it, respondent would have had an opportunity to meet the Government's case with opposing evidence. As things stand, the only record fact bearing on the new defense is the finding by the Court of Claims that Respondent had an injunction against collection of processing taxes when the contracts were signed, a fact which completely negatives the existence of the asserted mistake.

Under the circumstances outlined above, it is submitted that this Court should apply the general principle that appellate courts should "confine themselves to the issue raised below". See *Hormel* v. *Helvering*, 312 U. S. 552, 556-558; *Helvering* v. *Wood*, 309 U. S. 344, 349; *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481, 498; *Helvering* v. *Minnesota Tea Company*, 296 U. S. 378, 380. See also "Raising New Questions on Appeal", 40 Harv. L. Rev. 907.

It is true that this Court will not apply the general principle "where the obvious result would be a plain miscarriage of justice" (*Hormel* v. *Helvering*, 312 U. S. at 558), but no such situation is involved here. Had the claim of mutual mistake, or unjust enrichment, developed during trial, there might have been fair opportunity for the respondent to present evidence in refutation or reduction of the counterclaim. The trial court might then have had some evidence upon which to make findings respecting it. But, when there is neither pleading, nor proof by the Government, and there is otherwise no suggestion to respondent

of any such defense, it would be notably severe to allow such a set-off first asserted in this Court. So to bind this respondent after trial in a suit at law, by an unsuggested equitable remedy founded upon mutual mistake and requiring affirmative proof, would in fact, settle upon the respondent the burden of anticipating and meeting in the trial any and every defense which might conceivably defeat its right of recovery. It is respectfully submitted that the allowance of the Government's contention here is not justifiable within the exception made in *Hormel* v. *Helvering*, *supra*.

Apart from the general rule against raising new points on appeal under circumstances requiring a remand for further proceedings, this Court has refused to consider grounds not presented in the petition for certiorari. *Gunning* v. *Cooley*, 281 U. S. 90; *General Talking Pictures Corporation* v. *Western Electric Co.*, 304 U. S. 175; *Dickinson Industrial Site, Inc.* v. *Cowan*, 309 U. S. 382. Since the Government failed to mention the equitable grounds in its petition for certiorari and the point was not raised or considered below, it is submitted that the refusal of this Court to consider it now will work no injustice, but will rather tend to promote the orderly course of litigation.

CONCLUSION.

It is, therefore, respectfully submitted that the decision of the Court below is correct and should be affirmed.

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Of Counsel:
JOSEPH B. BRENNAN.

November, 1941.

APPENDIX.

Budget and Accounting Act, 1921, 42 Stat. 20:

SEC. 305. Section 236 of the Revised Statutes is amended to read as follows:

"SEC. 236. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office." [U. S. C., Title 31, Sec. 71.]

Agricultural Adjustment Act, 48 Stat. 31, as amended:

SEC. 9 (a) To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that any one or more payments authorized to be made under section 8 are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation; * * *. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that all payments authorized under section 8 which are in effect are to be discontinued with respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture; * * *.

(b) (1) The processing tax shall be at such rate as equals the difference between the current average farm

price for the commodity and the fair exchange value of the commodity, plus such percentage of such difference, not to exceed 20 per centum, as the Secretary of Agriculture may determine will result in the collection, in any marketing year with respect to which such rate of tax may be in effect pursuant to the provisions of this title, of an amount of tax equal to (A) the amount of credits or refunds which he estimates will be allowed or made during such period pursuant to section 615(c) of this title with respect to the commodity and (B) the amount of tax which he estimates would have been collected during such period upon all processings of such commodity which are exempt from tax by reason of the fact that such processings are done by or for a State, or a political subdivision or an institution thereof, had such processings been subject to tax. If, prior to the time the tax takes effect, or at any time thereafter, the Secretary has reason to believe that the tax at such rate, or at the then existing rate, on the processing of the commodity generally or for any designated use or uses, or on the processing of the commodity in the production of any designated product or products thereof for any designated use or uses, will cause or is causing such reduction in the quantity of the commodity or products thereof domestically consumed as to result in the accumulation or surplus stocks of the commodity or products thereof or in the depression of the farm price of the commodity, then the Secretary shall cause an appropriate investigation to be made, and afford due notice and opportunity for hearing to interested parties. If thereupon the Secretary determines and proclaims that any such result will occur or is occurring, then the processing tax on the processing of the commodity generally or for any designated use or uses, or on the processing of the commodity in the production of any designated product or products thereof for any designated use or uses, shall be at such lower rate or rates as he determines and proclaims will prevent such accumulation of surplus stocks and depression of the farm price of the commodity, and the tax shall remain during its effective period at such lower rate until the Secretary, after due notice and opportunity for hearing to interested parties, determines and proclaims that an increase in the rate of such tax

pression of the farm price of the commodity. Thereafter the processing tax shall be at the highest rate which the Secretary determines will not cause such accumulation of surplus stocks or depression of the farm price of the commodity, but it shall not be higher than the rate provided in the first sentence of this paragraph.

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[U. S. C. Supp. V, Title 7, Sec. 609.]

Sec. 18 (a) If (1) any processor, jobber, or wholesaler has, prior to the date a tax with respect to any commodity is first imposed under this chapter, made a bona fide contract of sale for delivery on or after such date, of any article processed wholly or in chief value from such commodity, and if (2) such contract does not permit the addition to the amount to be paid thereunder of the whole of such tax, then (unless the contract prohibits such addition) the vendee shall pay so much of the tax as is not permitted to be added to the contract price.

(b) Taxes payable by the vendee shall be paid to the vendor at the time the sale is consummated and shall be collected and paid to the United States by the vendor in the same manner as other taxes under this chapter. In case of failure or refusal by the vendee to pay such taxes to the vendor, the vendor shall report the facts to the Commissioner of Internal Revenue who shall cause collections of such taxes to be made from the vendee.

MISCELLANEOUS

SEC. 10. * * *.

* * * * * * * * *

(c) The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title. Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

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[U. S. C. Supp. V, Title 7, Sec. 610.]

COMMODITIES

SEC. 11. As used in this title, the term "basic agricultural commodity" means wheat, rye, flax, barley, cotton, field corn, grain sorghums, hogs, cattle, rice, potatoes, tobacco, peanuts, sugar beets and sugarcane, and milk and its products, and any regional or market classification, type, or grade thereof; * * *.

[U. S. C. Supp. V, Title 7, Sec. 611.]

Revenue Act of 1936, 49 Stat. 1648:

SEC. 501. TAX ON NET INCOME FROM CERTAIN SOURCES.

(a) The following taxes shall be levied, collected, and paid for each taxable year (in addition to any other tax on net income), upon the net income of every person which arises from the sources specified below:

(1) A tax equal to 80 per centum of that portion of the net income from the sale of articles with respect to which a Federal excise tax was imposed on such person but not paid which is attributable to shifting to others to any extent the burden of such Federal excise tax and which does not exceed such person's net income for the entire taxable year from the sale of articles with respect to which such Federal excise tax was imposed.

(2) A tax equal to 80 per centum of the net income from reimbursement received by such person from his vendors of amounts representing Federal excise-tax burdens included in prices paid by such person to such vendors, to the extent that such net income does not exceed the amount of such Federal excise-tax burden which such person in turn shifted to his vendees.

(3) A tax equal to 80 per centum of the net income from refunds or credits to such person from the United States of Federal excise taxes erroneously or illegally collected with respect to any articles, to the extent that such net income does not exceed the amount of the burden of such Federal excise taxes with respect to such articles which such person shifted to others.

(b) The net income (specified in subsection (a) (1)) from the sale of articles with respect to which the Federal excise tax was not paid, and the net income speci-

fied in subsection (a) (2) or (3), shall not include the net income from the sale of any article, from reimbursement with respect to any article, or from refund or credit of Federal excise tax with respect to any article (1) if such article (or the articles processed therefrom) were not sold by the taxpayer on or before the date of the termination of the Federal excise tax; (2) if the taxpayer made a tax adjustment with respect to such article (or the articles processed therefrom) with his vendee; or (3) if under the terms of any statute the taxpayer would have been entitled to a refund from the United States of the Federal excise tax with respect to the article otherwise than as an erroneous or illegal collection (assuming, in case the tax was not paid, that it had been paid).

• • • • • • • • • •

(j) As used in this section—

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(2) The term "date of the termination of the Federal excise tax" means, in the case of a Federal excise tax held invalid by a decision of the Supreme Court, the date of such decision.

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(4) The term "tax adjustment" means a repayment or credit by the taxpayer to his vendee of an amount equal to the Federal excise tax with respect to an article (less reasonable expense to the vendor in connection with the nonpayment or recovery by him of the amount of such tax and in connection with the making of such repayment or credit) if such repayment or credit is made on or before June 1, 1936, or thereafter in the *bona fide settlement of a written agreement* entered into on or before March 3, 1936.

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SEC. 601. REFUNDS UNDER AGRICULTURAL ADUSTMENT ACT ON EXPORTS, DELIVERIES FOR CHARITABLE DISTRIBUTION OR USE, ETC.

(a) The provisions of sections 10 (d), 15 (a), 15 (c), 16 (e) (1), 16 (e) (3), and 17 (a) of the Agricultural Adjustment Act, as amended, are hereby reenacted but only for the purpose of allowing refunds in accordance therewith in cases where the delivery

for charitable distribution or use, or the exportation, or the manufacture of large cotton bags, or the decrease in the rate of the processing tax (or its equivalent under section 16 (e) (3)), took place prior to January 6, 1936.

SEC. 602. FLOOR STOCKS AS OF JANUARY 6, 1936.

(a) There shall be paid to any person who, at the first moment of January 6, 1936, held for sale or other disposition (including manufacturing or further processing) any article processed wholly or in chief value from a commodity subject to processing tax, an amount computed as provided in subsection (b), except that no such payment shall be made to the processor or other person who paid or was liable for the tax with respect to the articles on which the claim is based.

(c) As used in this section—

(1) The term "commodity subject to a processing tax" means a commodity upon the processing of which a tax was provided for under the Agricultural Adjustment Act, as amended, as of January 5, 1936.

* * * * * * * * *

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, * * *.

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SEC. 906. PROCEDURE ON CLAIMS FOR REFUNDS OF PROCESSING TAXES.

* * * * * * * * *

(b) There is hereby established in the Treasury Department a Board of Review (hereinafter referred to as "the Board"). * * * The Board shall have jurisdiction in proceedings under this section to review the allowance or disallowance of the Commissioner of a claim for refund, and to determine the amount of refund due any claimant with respect to such claim. The Commissioner shall make refund of any such amount determined by a decision of the Board which has become final. The proceedings of the Board and its divisions shall be conducted in accordance with such rules and regulations as the Board may prescribe, with the approval of the Secretary.

* * * * * * * * *

SEC. 907. EVIDENCE AND PRESUMPTIONS.

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

* * * * * * * * *

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. * * *

* * * * * * * * *

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing

tax. Such proof may include, but shall not be limited to—

(1) * * * If the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. * * *

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Internal Revenue Code, Sec. 3443(d):

(d) No overpayment of tax under this chapter shall be credited or refunded (otherwise than under subsection (a)), in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he has repaid the amount of the tax to the ultimate purchaser of the article, or unless he files with the Commissioner written consent of such ultimate purchaser to the allowance of the credit or refund.

Treasury Regulations 81, promulgated under the Agricultural Adjustment Act:

ART. 9. *Exemptions from processing tax.*—

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(b) *Processing by, or for, or for sale to, the United States, a State, or the instrumentality of either.*—Processing for, or for sale to, the United States, a State, a Territory, or a possession, is subject to the tax, whether or not the commodity or the product derived from the commodity is owned by the United States, such State, such Territory, or such possession. Where a State of

the United States is engaged in the business of processing, or in processing and the business of selling the articles resulting from such processing, such processing is subject to tax, and such State is liable, as processor, for the tax. Where a State of the United States is neither engaged in the business of processing, nor engaged in processing and the business of selling articles resulting from the processing, and the processing and disposition of the articles processed are done by the State itself in the exercise of an essential governmental function, such processing is not subject to tax, and such State is not liable for the tax.

SUPREME COURT OF THE UNITED STATES.

No. 45.—October Term, 1941.

The United States, Petitioner, vs. The Kansas Flour Mills Corporation.	On Petition for Writ of Certiorari to the Court of Claims.

[December 8, 1941.]

Mr. Justice Roberts delivered the opinion of the Court.

Between May, 1935, and January 6, 1936, the respondent entered into eight contracts for the sale of flour to the United States. Deliveries were duly made and the contract price was paid. Each of the eight contracts provided:

"Prices set forth herein include any Federal tax heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, processing tax, adjustment charge or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract, and are paid to the Government by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly, and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items."

Under the terms of the Agricultural Adjustment Act,[1] processing taxes were due in respect of the flour sold aggregating $28,419.20.

In 1936 the respondent entered into four contracts for the sale of flour and bran to the United States for a total price of $23,288.11. The commodities were delivered and vouchers for the purchase price tendered to the General Accounting Office. Payment was withheld by the Comptroller General who notified the respondent that the Government had overpaid it in the sum of $28,419.20.

The respondent had obtained an injunction against the collection of any processing taxes from it and, as a result of the decision

[1] U. S. C. Supp. V, Tit. 7, § 609.

in *United States* v. *Butler*, 297 U. S. 1, paid no processing taxes on the wheat used in the manufacture of flour covered by the 1935 contracts.

The respondent sued in the Court of Claims to recover the purchase price under the four 1936 contracts and contested the offsets claimed by the Government arising out of the eight 1935 contracts. Judgment was rendered in favor of the respondent for $23,288.11. We granted certiorari because of the importance of the question[2] and of the number of pending cases involving the same question. We are of opinion that the respondent was not entitled to recover.

The contracts are to be construed in the light of the relations between the parties at the time they were executed. The Agricultural Adjustment Act did not exempt a vendor to the United States from the processing tax; and a Treasury Regulation required that he pay the tax.[3] The quoted clause shows that this tax was specifically in the minds of the parties, for it was stipulated that it was included in the price bid. The Government stood in a dual relation to the respondent. It became, at the same time, a purchaser at the named price and also a claimant of the processing tax upon the material purchased. The stipulation was evidently made in view of the facts that the purchasing officer could not buy the goods tax-free and that the Government desired that the price to it should be ex-tax. To accomplish this the sale price was *pro tanto* offset by the amount of the tax. Plainly, if the United States had not been thought entitled to collect the tax, the bid price would not have been acceptable. Plainly, also, if the respondent had not been thought liable for the tax, the bid price would have been less.[4] As disclosed by the contracts, the understanding was that the price would have been less by the amount of the tax. The respondent disputes this, contending that we cannot say how much of the tax it was willing to absorb in order to obtain the contracts; that it may have been making the sales at an actual loss. But this is not the theory of the contracts. They provide that if, in future, any existing tax described therein is changed by Congress the price named in each contract "will be

[2] United States v. Hagan & Cushing Co., 115 F. 2d 849; Ismert-Hincke Milling Co. v. United States, 90 C. Cls. 27; United States v. American Packing & Provision Co., 122 F. 2d 445.

[3] Regulations 81, Art. 9, under the Agricultural Adjustment Act.

[4] Compare United States v. Glenn L. Martin Co., 308 U. S. 62.

increased or decreased accordingly." This does not mean, as contended by respondent, that the amount of increase or decrease is an unknown quantity to be made definite and certain by proof. It means that the amount of any increase in tax shall be added and the amount of any decrease subtracted from the contract price. This view is strengthened by the provision for separate billing of the increase, if any.

The respondent, however, argues that, under any construction, the Government is not entitled to maintain its set-off, first, because the contracts contain no undertaking by respondent that it will pay the tax and, secondly, that, even if they do, the stipulation for reduction of price applies only to changes by Congress and excludes relief from the tax by an adjudication that the exaction is unconstitutional.

In support of the first proposition, the respondent relies on numerous decisions holding tax clauses in private contracts not to require adjustment of the contract price as a result of the decision in the *Butler* case, *supra*.[5] These go on the absence of an express provision respecting the constitutional validity and upon the omission of the parties to bill the tax separately from the purchase price. We think they are inapplicable in the present case since the tax clause here had a purpose different from those in private contracts. As we have said, the purpose here was to deprive either party of the advantage or disadvantage resulting from the incidence of the tax and, therefore, it was sought to eliminate the effect of the exaction on the contract price.

In the case of private contracts, the vendees purchase for resale and the tax burden assumed is passed on to their customers. The fact that the processor—the vendor—is protected from the payment of the tax by injunction does not reduce the price to the vendee or to purchasers from him. The courts will not permit the unjust enrichment involved in recovery by the vendee of the amount of tax which he has passed on to his creditors.[6] In the contracts in

[5] Moundridge Milling Co. v. Cream of Wheat Corp., 105 F. 2d 366; Consolidated Flour Mills v. Ph. Orth Co., 114 F. 2d 808; United States v. American Packing & Provision Co., 122 F. 2d 445; City Baking Co. v. Cascade Milling & Elevator Co., 24 F. Supp. 950; G. S. Johnson Co. v. N. Sauer Milling Co., 148 Kan. 861 (1938); Sparks Milling Co. v. Powell, 283 Ky. 669 (1940); Crete Mills v. Smith Baking Co., 136 Neb. 448 (1939).

[6] See the cases cited Note 5. The respondent urges that the unjust enrichment tax imposed by Title III of the Revenue Act of 1936 (49 Stat. 1734) destroys the equity of the Government's case, but if respondent is required

question, the Government did not buy for resale. Unless it received the tax it suffered a definite disadvantage.[7] Its purpose, as shown by the contracts, was to balance the tax element in the price paid with the tax collected.[8] The Government, which could not pass on the tax on resale, was thus protected, not against a fall in the market price but against a loss in its tax revenues. In cases of private sales, the processor's injunction against collection of the tax, as held by the cases cited, worked no harm to his vendee. A similar injunction, in the case of Government contracts, would leave the price to the Government at the higher level reflecting the tax and deprive the Government of the reciprocal benefit flowing from collection of the tax.

In its second position the respondent attempts to meet what has been said as to the inequity of its retaining the full price, when it escapes paying the tax, with the argument that the result is inevitable under the contracts. It refers to the fact that it had already obtained an injunction against the collection of the processing tax when some of the 1935 contracts were made and asserts that if the Government desired to provide against a decision that the taxing act was unconstitutional this could readily have been done by the addition of a single phrase.

As we have said, there is respectable authority for the position that tax clauses in private contracts do not reach a judicial decision of invalidity of the statute. We think, however, these decisions have no application in the present instance. Here legislation recognizing the decision in *United States* v. *Butler*, *supra*, and imposing taxes on the enrichment of those who passed on the amount of the tax without having to pay it, may properly be said to have been a change of the tax by Congress within the terms of the contracts.

The decision in the *Butler* case was rendered January 6, 1936. It is true that after that decision a taxpayer's right to an injunction against the collection of the tax was clear.[9] But, by the Revenue

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to reduce its price by the amount of its unpaid processing tax it will not be subject to the unjust enrichment tax on these transactions. See §§ 501(b)(2) and 501(j)(4).

[7] In United States v. American Packing & Provision Co., 122 F. 2d 445, the Government was held entitled to maintain a set-off asserted under conditions like those here involved on the ground that the vendor had received money from the Government which in equity and good conscience it should repay.

[8] Compare United States v. Cowden Mfg. Co., 312 U. S. 34, 36-37.

[9] Rickert Rice Mills, Inc. v. Fontenot, 297 U. S. 110.

Act of 1936,[10] which became a law June 22, 1936, Congress not only recognized the effect of that decision as doing away with the tax in question but legislated with respect to the consequent rights and remedies of those who had paid the tax and the liability of those who had passed on its burden and escaped payment.

By Title III a tax is laid on the unjust enrichment consequent upon the passing on to customers the burden of unpaid processing taxes. In § 501(b)(i)(2) and (j)(2) Congress defines the date of termination of the tax as "*in the case of a Federal excise tax held invalid by a decision of the Supreme Court, the date of such decision.*" In Title IV there is a provision relative to floor stock taxes which recognizes the invalidity of the Agricultural Adjustment Act by reenacting the refund provisions of that Act in respect of transactions prior to January 6, 1936, the date of the *Butler* decision. (§ 601(a).) The title defines a taxable commodity as one on which a processing tax was provided for as of January 5, 1936, the day before the *Butler* decision. (§ 602(c)(1).)

Title VII makes provision for the refund of processing taxes collected under the Agricultural Adjustment Act and is a recognition by Congress that the taxes were invalid.

Thus a change in respondent's tax liability has been recognized and confirmed by Congress. Even though this legislative action was a confirmation of or acquiescence in the *Butler* decision, and although its effect may have been merely cumulative, it amounted to a change made by Congress in respondent's liability for the tax, within the meaning of the contracts.

The judgment is reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[10] 49 Stat. 1648.